Supreme Court, U.S.
FILED
94188 0 MAY 16 1995
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HOMESTEAD INSURANCE COMPANY,
Petitioner,

v.

DONALD ZOPPO, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the State of Ohio deny a person due process of law when its appellate procedure denies any review of assignments of error properly preserved and presented under state law?

2. Where a state permits appellate review of a jury's determination that punitive damages should be assessed in a tort claim, does due process require the state to provide meaningful review of all assignments of error relating to the punitive damage award properly preserved and presented by the person taking the appeal, or may the state refuse to permit review of some of the assignments of error?

3. Where a state's appellate procedure authorizes an intermediate court of appeals to decline to address an assignment of error properly preserved and presented because its disposition of a second assignment of error makes the first assignment of error moot, does due process require opportunity for meaningful review of the first assignment of error in the event that the state's court of last resort reverses the judgment of the court of appeals and in so doing restores the significance of the first assignment of error?

LIST OF PARTIES

The petitioner is Homestead Insurance Company * which has its principle place of business at Secaucus, New Jersey. The petitioner was the defendant in the courts below. Attorneys for petitioner are Alan M. Petrov, Timothy J. Fitzgerald and Thomas D. Robenalt, 1501 Euclid Avenue, Seventh Floor, Cleveland, Ohio 44115.

The respondents are Donald Zoppo, an individual residing in the state of Ohio and two corporations, Windy's Restaurant, Inc. and Windy's Inc. They were the plaintiffs in the courts below. Respondents are represented by Robert P. Rutter, 4700 Rockside Road, Suite 650, Cleveland, Ohio 44131.

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* Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Homestead Insurance Company is a subsidiary of Homestead National Corporation which is a subsidiary of Euclid Services Corporation. The Shell Factory Museum, Inc. is a subsidiary of Homestead Insurance Company.

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No. ———

HOMESTEAD INSURANCE COMPANY,
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v.

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Petition for Writ of Certiorari to the Supreme Court of Ohio

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OPINIONS FROM THE COURT BELOW

The opinion of the Supreme Court of Ohio, officially reported at 71 Ohio St.3d 552, is set forth in the Appendix at pp. 1a-15a. The Order of the Supreme Court of Ohio denying the motion for reconsideration is set forth in the Appendix at p. 16a. The Journal Entry and Opinion of the Court of Appeals of Ohio, Eighth District, not officially reported, is set forth in the Appendix at pp. 17a-36a.

JURISDICTION

The judgment of the Supreme Court of Ohio was announced on December 30, 1994. A timely motion for reconsideration was denied by the Supreme Court of Ohio on February 15, 1995. This Court has jurisdiction over this matter under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the fourteenth amendment to the Constitution of the United States, and Rule 12(A)(1) of the Ohio Rules of Appellate Procedure.

The fourteenth amendment to the U.S. Constitution provides, in pertinent part, as follows:

> "Section 1. * * * nor shall any State deprive any person of * * * property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 12(A)(1) of the Ohio Rules of Appellate Procedure provides, in pertinent part, as follows:

> On an undismissed appeal from a trial court, a court of appeals shall do all of the following:
>
> (a) Review and affirm, modify, or reverse the judgment or final order appealed;
>
> (b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and unless waived, the oral argument under App.R. 21;
>
> (c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

STATEMENT OF THE CASE

On October 13, 1988, Windy's Bar, an establishment located in Cleveland, Ohio, was badly damaged by fire. (App., pp. 1a, 18a) Windy's Bar was owned and operated by respondent Donald Zoppo. (App., p. 1a) It was insured pursuant to a policy of fire insurance issued by petitioner, Homestead Insurance Company, only six months before the fire. (App., pp. 1a-2a, 18a)

The fire was reported to petitioner by Mr. Zoppo's insurance agent the morning of the fire. Petitioner immediately began an investigation of the fire. The investigation disclosed that the fire was caused by arson involving the use of a liquid accelerant. (App., pp. 1a, 18a) The investigation also disclosed that Mr. Zoppo could not explain his whereabouts at the time of the fire or his activities on the night of the fire. Mr. Zoppo gave materially conflicting statements to the investigators in this regard. (App., pp. 2a, 18a)

Because of the suspicious origin of the fire, Mr. Zoppo's conflicting versions about his whereabouts, other inconsistent statements by Mr. Zoppo, and other facts obtained through investigation, petitioner determined that Mr. Zoppo was involved in causing the fire and refused to pay his insurance claim. (App., p. 2a) In March 1989, after concluding its investigation and obtaining an opinion from a law firm in Cleveland, petitioner denied Mr. Zoppo's insurance claim. (App., pp. 2a, 19a)

In August 1989, respondents filed suit against petitioner in the Court of Common Pleas for Cuyahoga County, the state court of general jurisdiction. The respondents' complaint alleged state law claims for breach of contract and for bad faith, a tort under Ohio law. Respondents' complaint prayed for both compensatory and punitive damages. Petitioner denied all liability.

The claim proceeded to trial on August 26, 1991. The jury returned a verdict in favor of respondents, and judgment was entered awarding $80,000 in compensatory damages on the breach of contract claim, $122,800 in compensatory damages on the bad faith claim, and $65,000 for respondents' attorney's fees. (App., p. 37a) The jury received an instruction that punitive damages could be assessed against petitioner if its conduct constituted malice, or oppression, or insult. (App., pp. 45a, 85a) Pursuant to this instruction, the jury circled the word "insult" in answering an interrogatory and found that petitioner's conduct justified the imposition of punitive

damages. (App., p. 45a) The trial court, pursuant to an Ohio statute requiring the trial court to set the amount of punitive damages, then awarded respondents $50,000 in punitive damages. (App., p. 37a) Petitioner filed post-trial motions for judgment notwithstanding the verdict or, alternatively, for a new trial. The trial court denied these motions. (App., p. 39a)

Petitioner appealed the judgment to the Ohio Court of Appeals for Cuyahoga County. Petitioner properly preserved and presented eight assignments of error. (App., pp. 17a-28a, 65a-66a) In its written opinion addressing petitioner's appeal, the Court of Appeals overruled only one of petitioner's assignments of error, affirming the award of damages on respondents' breach of contract claim. (App., pp. 27a-28a) The Court of Appeals sustained one of petitioner's assignments of error, ruling that a directed verdict should have been granted in petitioner's favor on the tort claim for bad faith. The Court of Appeals entered final judgment for petitioner on the bad faith claim. (App., pp. 19a-25a) The Court of Appeals vacated the compensatory damage awards for bad faith and attorney's fees and the punitive damage award. (App., pp. 25a-28a)

The six remaining assignments of error perfected by the petitioner were not decided by the Court of Appeals. These six assignments of error claimed, *inter alia*, that the trial court erred in its jury instructions on the issues of bad faith, compensatory damages, and punitive damages, that the trial court erred in the admission of evidence, and that the trial court erred during the course of proceedings in instructing the jury to deliberate further after the jury had returned a general verdict and interrogatory answers. (App., pp. 25a-28a, 85a-92a) The Court of Appeals determined, and properly so, that these assignments of error were made moot by the disposition of the assignment of error that was sustained. (App., pp. 25a-28a) The Court of Appeals was authorized by Rule 12(A) of the Ohio Rules of Appellate Procedure to de-

cline to address assignments of error made moot by the disposition of other assignments of error.[1]

Respondents appealed the Court of Appeals' decision to the Supreme Court of Ohio. In an opinion announced on December 30, 1994, the Supreme Court of Ohio reversed the judgment that had been entered for petitioner by the Court of Appeals and reinstated the trial court's judgment for compensatory damages and attorney's fees on the bad faith tort claim. (App., p. 10a) The Supreme Court of Ohio did not remand the case to the Court of Appeals for consideration of the six assignments of error that had been moot but were moot no longer. The Supreme Court of Ohio impliedly addressed only one of petitioner's remaining assignments of error in its own opinion. Five of petitioner's assignments of error, even though they were properly preserved, briefed, and argued, were never decided by any appellate court in Ohio. Three of those undecided assignments of error relate to either the jury's determination that punitive damages should be assessed or the compensatory damage award that serves as a necessary predicate to the punitive damage award. Had any of these three assignments of error been sustained, petitioner would have been entitled to a new trial on at least the punitive damage claim.

The only direction given by the Supreme Court of Ohio by the terms of its remand was the instruction that the trial court hold a jury trial to determine only the amount of punitive damages to be awarded. (App., p. 10a) The Supreme Court held that Ohio's legislative enactment requiring the trial judge to set the amount of punitive damages (after a jury determines whether they should be

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[1] Prior to July 1, 1992, the Court of Appeals would have been required by rule to decide all assignments of error, including those made moot by the disposition of other assignments. The amendment to the rule was promulgated to promote the conservation of judicial resources. Courts of appeal, by virtue of the amendment, were no longer required to discuss and decide meaningless assignments of error.

awarded) violated the right to a jury trial established by the Ohio Constitution. (App., pp. 7a-9a)

Petitioner timely filed a motion for reconsideration in the Supreme Court of Ohio on January 9, 1995. (App., pp. 40a-60a) Petitioner requested that the case should be remanded to the Court of Appeals for consideration by the Court of Appeals of petitioner's five unresolved assignments of error. (App., pp. 40a-41a) Petitioner argued in its motion for reconsideration, *inter alia*, that the reinstatement of the trial court's judgment without appellate review of petitioner's unresolved assignments of error would deprive petitioner of due process of law guaranteed by the fourteenth amendment to the United States Constitution. (App., pp. 55a-59a)

On February 15, 1994, the Supreme Court of Ohio, without opinion and with the Chief Justice and one other justice dissenting, denied petitioner's motion for reconsideration. (App., p. 16a) *See*, 71 Ohio St. 3d 1467.

Petitioner had advised the Supreme Court of Ohio in its brief on appeal that a reversal of the judgment of the court of appeals would necessitate a remand to that court for consideration of the unresolved assignment of error. When the Supreme Court of Ohio's decision and opinion failed to do so, petitioner's motion for reconsideration immediately presented the constitutional arguments that are the basis for this petition. (App., pp. 55a-59a) Prior to the Supreme Court of Ohio's decision on December 30, 1994, wherein this case was remanded to the trial court instead of to the intermediate court of appeals, there was no infringement of petitioner's due process rights. Petitioner's argument that the due process guarantees of the fourteenth amendment required meaningful review of all unresolved assignments of error was immediately called to the attention of the Supreme Court of Ohio in the motion for reconsideration on January 9, 1995. (App., pp. 55a-59a) This constitutional argument was rejected with no explanation by the Supreme Court of Ohio in its order denying petitioner's motion for reconsideration. (App., p. 16a)

REASONS FOR GRANTING THE WRIT

The fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of * * * property, without due process of law." The protection of the due process guarantee applies to the appellate review of judgments. When a state provides a mechanism for obtaining appellate review of trial court judgments, the right to due process attaches to appellate proceedings. *See, Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). A state may not be constitutionally required to create an appellate system, but any appellate system it chooses to create must satisfy the requirements of due process. *See, Evitts v. Lucey*, 469 U.S. 387, 400-401, 105 S.Ct. 830, 838-839, 83 L.Ed.2d 821, 832-833 (1985).

When a state acts arbitrarily in denying or refusing individuals the right to use established state court process and procedures, such action is violative of the concept of fundamental fairness inherent to minimal due process standards. *See, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The Supreme Court of Ohio has, in past decisions, recognized that due process guarantees extend to appellate procedure and that the right to appeal an adverse judgment cannot be arbitrarily denied. *See, Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 523 N.E. 2d 851 (1988); *Moldovan v. Cuyahoga Cty. Welfare Dept.*, 25 Ohio St. 3d 293, 496 N.E. 2d 466 (1986).

Historically, Ohio precedent and appellate rules of procedure had required courts of appeals in the state to address and decide each assignment of error raised by appellants. *See, Himebaugh v. Dayton*, 145 Ohio St. 237, 243, 61 N.E.2d 483, 486 (1945); *Criss v. Springfield Twp.*, 43 Ohio St.3d 83, 538 N.E. 2d 406 (1989); *Danner v. Medical Center Hospital*, 8 Ohio St.3d 19, 456 N.E. 2d 503 (1983); *Dougherty v. Torrence*, 2 Ohio St.3d 69, 442 N.E. 2d 1295 (1982); *Smith v.*

Jaggers, 33 Ohio St.2d 1, 62 Ohio Op. 2d 168, 292 N.E. 2d 641 (1973); *Lumberman's Alliance v. American Excelsior Corp.*, 33 Ohio St.2d 37, 62 Ohio Op. 2d 373, 294 N.E. 2d 224 (1973).

Indeed, in mid-October 1994, just 2½ months before deciding this case, the Supreme Court of Ohio, in reciting the procedural history of a case before it, acknowledged that it had once remanded that case to the court of appeals to decide assignments of error that the appellate court had determined to be moot. *See*, *Leber v. Smith*, 70 Ohio St.3d 548, 551, 639 N.E. 2d 1159, 1162 (1994). The practice of remanding a case to an intermediate court of appeal for a determination of all assignments of error provided an appellant with review of all its asserted assignments of error, not merely those that a court chose to review, and satisfied the requirements of procedural due process.

Why the Supreme Court of Ohio declined to provide due process guarantees and remand this case to the court of appeals was not expressly stated in that court's opinion. The motion for reconsideration was denied without opinion. (App., p. 16a) The apparent "justification" for the Supreme Court of Ohio's action was a 1992 amendment to Rule 12 of the Ohio Rules of Appellate Procedure. Before July 1, 1992, App. R. 12 required a court of appeals to decide every assignment of error raised by an appellant, irrespective of whether its disposition of another assignment of error rendered it moot. As of July 1, 1992, and for the obvious purpose of easing the burden of appellate courts, App. R. 12 was amended. The requirement that all assignments of error be decided was eliminated. As of July 1, 1992, appellate courts in Ohio were free to refrain from ruling upon assignments of error that were made moot by the disposition of other assignments of error.

Due process requirements do not permit the amendment to Ohio's App. R. 12 to be interpreted in a manner

that forecloses forever the opportunity for appellate review of certain assignments of error, particularly assignments of error relating to an assessment of punitive damages. The amended rule, as applied by the Supreme Court of Ohio to this case, foreclosed review, foreclosed in particular review of the punitive damage award, and deprived petitioner of procedural due process.

The Staff Note to the July 1, 1992 Amendment to App. R. 12(A), suggests that the rule can be applied in a manner that does not deprive a litigant of due process. The Staff Note, in relevant part, states as follows:

> Requiring a court of appeals to rule on an assignment of error it finds moot in light of its ruling on another assignment is not in the interest of judicial economy. The principal reason for requiring the court of appeals to rule on an assignment of error it considers moot is that if the case is reviewed by the Supreme Court and if the Supreme Court wishes to review the claimed error, it may be helpful to the Supreme Court to have the court of appeals' ruling on the assignment of error. That is likely to happen, however, only if the court of appeals grants a reversal on one assignment of error, treats other issues as moot in light of that reversal, review is sought in the Supreme Court, and the Court rejects the court of appeals' reversal on the assignment of error, but then wishes to consider other assignments of error raised by the appellant to determine whether the original judgment should be reversed on one of those assignments of error. In this situation, if the Supreme Court wants the court of appeals to rule on the assignment of error before it does, it can remand the case for that purpose, as it did in *Criss*. While that may delay the ultimate resolution in that case, the situation is not likely to arise often enough to justify requiring the court of appeals in every case to rule on every assignment of error it finds moot.

The advancement of the interests of judicial economy is a laudable objective. The interests of judicial economy,

however, must yield to the requirements of due process, and App.R. 12(A) cannot be interpreted or applied in a fashion that peremptorily deprives an appellant of due process rights and a fair review of all material assignments of error raised in an appeal from a judgment. Fundamental fairness requires no less.

This Court addressed a similar constitutional deficiency in Oregon procedural law in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. ——, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). This Court held in *Oberg* that a 1910 amendment to the Oregon state constitution that prohibited reversal of punitive damages awarded by a jury "unless the court can affirmatively say there is no evidence to support the verdict" violated the fourteenth amendment's Due Process Clause. The Oregon constitutional amendment deprived defendants of traditional common law procedural protection (i.e., meaningful post-judgment review by the trial court judge and appellate courts) against arbitrary and inaccurate adjudications.

Oberg establishes that the guarantees of the Due Process Clause extend to punitive damage awards and require meaningful post-judgment review of the amount of those awards. There are other recent decisions in which this Court has recogniezd that there are due process limitations upon punitive damage awards. *See, Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); and *TXO Production Corp. v. Alliance Resources*, 509 U.S. ——, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993).

The refusal by the Supreme Court of Ohio to permit review of the unresolved assignments of error has deprived petitioner of appellate review of both the judgment upon which the punitive award is based and the jury's determination that punitive damages should be awarded. One of the assignments of error unresolved by the court of appeals and not addressed by the Supreme Court of Ohio concerned the trial court's jury charge on the issue of

punitive damages. (App., pp. 46a-48a) The trial court charged the jury that it could award punitive damages if it found petitioner's conduct to be oppressive or insulting. Petitioner objected to the jury charge. (App., pp. 45a, 85a-86a) The court of appeals found that assignment of error, as well as others, to be moot. (App., p. 25a) The Supreme Court of Ohio discussed whether the evidence at trial would support a punitive damage award and concluded that there was sufficient evidence of actual malice to present a jury issue on punitive damages. But the Supreme Court of Ohio did not consider the propriety of the jury charge. No appellate court in Ohio has. Because of the manner in which Ohio App. R. 12(A) has been applied to the case, petitioner has been denied appellate review of an assignment of error material to the judgment and properly raised and preserved.[2]

The Supreme Court of Ohio, in applying the 1992 amendment to App.R. 12 to preclude appellate review, abrogated a well-established, common law protection. Appellate review of all assignments of error was a procedure designed to protect litigants against arbitrary and inaccurate adjudications and civil damage awards. The due process violation present in this case is no less flagrant than that involved in *Oberg*, and this case is no less deserving of review.

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[2] The assignments of error relating to compensatory damages (jury charge, admission of evidence) also effect the jury's determination that punitive damages should be awarded. If the trial court committed prejudicial error in its charge on compensatory damages or in the admission of evidence, petitioner would be entitled to a new trial on those issues and, therefore, to a new trial on the claim for punitive damages. The Supreme Court of Ohio has refused to permit review of these assignments of error and has ordered that the case be remanded for a trial only as to the amount of punitive damages to be awarded.

CONCLUSION

WHEREFORE, petitioner, Homestead Insurance Company respectfully requests that this United States Supreme Court issue a writ of certiorari to the Supreme Court of Ohio so that the constitutional violations that have occurred in this case can be rectified.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF OHIO

JANUARY TERM, 1994

Case No. 93-1616

DONALD ZOPPO, *et al.*,
Appellants

v.

HOMESTEAD INSURANCE COMPANY,
Appellee

Appeal from the Court of Appeals
for Cuyahoga County
No. 62926

(Submitted November 1, 1994
Decided December 30, 1994)

STATEMENT OF THE CASE

In the early morning hours of October 13, 1988, Windy's Bar Restaurant, an establishment owned and insured by Donald Zoppo, was destroyed by fire. The fire was incendiary in nature and was started with kerosene, a liquid accelerant. At the time of the fire, Zoppo had an insurance contract in effect issued by Homestead In-

surance Company. The coverage on the Homestead policy was $50,000 for the building and $65,000 for its contents.

Following its investigation, Homestead denied coverage to Zoppo. Homestead concluded that there was sufficient evidence that Zoppo had participated in setting the fire. Further, Homestead found that Zoppo had made material misrepresentations regarding his whereabouts on the night of the fire and regarding whether he had additional insurance.

Zoppo then brought suit against Homestead for breach of the insurance contract and for the tort of bad faith refusal to settle. Zoppo sought punitive damages in connection with the bad faith claim. The case went to trial before a jury.

After Zoppo's case in chief, Homestead moved for a directed verdict on the bad faith and punitive damages claims. The court denied these motions. The court instructed the jury on the relevant law. The court's instruction on bad faith was based upon the reasonable justification standard as enunciated in case law prior to *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 590 N.E.2d 1228.

The jury returned verdicts for Zoppo in the sum of $80,000 in compensatory damages on the breach of contract claim and $187,800 on the bad faith claim ($122,800 in compensatory damages plus $65,000 in attorney fees). The jury also found that Zoppo was entitled to punitive damages. Pursuant to R.C. 2315.21(C)(2), the trial court set the amount of punitive damages at $50,000.

Homestead appealed and Zoppo cross-appealed. During the pendency of these appeals, this court decided *Said, supra*, which did away with the reasonable justification standard and made intent an element of bad faith.

The court of appeals affirmed the breach of contract claim but reversed the trial court's judgment on the issue of bad faith. The court of appeals held that there was no evidence of wrongful intent on the part of Homestead in denying Zoppo's claim. Hence, it found that the trial court erred in denying Homestead's motion for a directed verdict on the bad faith claim. The court of appeals also vacated the award of punitive damages and attorney fees.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

OPINION

FRANCIS E. SWEENEY, SR., J. The issues before this court are: (1) whether actual intent by the insurer to refuse to fulfill its contract with the insured is a requisite element of the tort of bad faith as held in *Said*; and (2) whether R.C. 2315.21(C)(2), requiring the court to set the amount of punitive damages even in jury trials, is violative of the right to trial by jury. For the reasons that follow, we overrule *Said*: and hold that actual intent is not an element of the tort of bad faith. We further hold that R.C. 2315.21(C)(2) violates the right to trial by jury. Accordingly, we reverse the judgment of the court of appeals.

I

Bad Faith

This court must initially determine the proper standard used to decide whether an insurer has breached its duty to its insured to act in good faith. In deciding this issue, it is necessary to revisit our decision in *Motorists Mut. Ins. Co. v. Said, supra,* 63 Ohio St.3d 690, 590 N.E.2d 1228.

In *Said,* we held that:

"A cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by *intentionally* refusing to satisfy an insurer's claim where their is either (1) no lawful basis for the refusal coupled with *actual knowledge* of that fact or (2) an *international* failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim." (Emphasis added.) *Id.* at paragraph three of the syllabus.

Rather than clarify the standard of proof required in the area of bad faith litigation as the *Said* decision set out to do, this court has caused greater confusion by erroneously making intent an element of the tort of bad faith.

Until *Said*, the element of intent had been notably absent from this court's definition of when an insurer acts in bad faith. In fact, with the exception of *Said* and the four-to-three decision of *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, 21 O.O.2d 420, 187 N.E.2d 45, over the past forty-five years this court has consistently applied the "reasonable justification" standard to bad faith cases. According to this standard, first announced in 1949 in the case of *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 39 O.O. 465, 87 N.E.2d 347, and reaffirmed in *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 6 OBR 337, 452 N.E.2d 1315, and *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, 525 N.E.2d 783, "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Id.* at 303, 525 N.E.2d at 788. Intent is *not* and has never been an element of the reasonable justification standard. Hence, in deciding *Said, supra,* and in relying upon the erroneous *Slater* decision, this court de-

parted from forty-five years of precedent. By expressly overruling *Said* and *Slater*, we will be following the logical progression of case law that has developed over the years.

We reject appellee's contention that under the doctrine of *stare decisis*, we must adhere to our decision in *Said*. The *Said* decision was an aberration that failed to follow clearly established precedent. As stated in *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed.2d 604, 612: "[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." In this case, *stare decisis* dictates that we correct our previous mistakes and reinstate the reasonable justification standard.

Our review of the record indicates the trial court correctly instructed the jury on the law of bad faith using the reasonable justification standard. There was ample evidence to support the jury's finding that Homestead failed to conduct an adequate investigation and was not reasonably justified in denying Zoppo's claim.

From the outset, Homestead's inquiry focused primarily on Zoppo, who claimed that he was in Pennsylvania hunting at the time of the fire. Homestead's investigators did not seriously explore evidence that other individuals, who were previously ousted from the bar by Zoppo, had threatened to burn the bar down. In fact, there was a previous attempt made to set the bar on fire. Two of the ousted men bragged in public that they were responsible for the attempted fire and one said he would be back "to finish the job." Following the actual fire, which occurred only three weeks after the attempted arson, one of the ousted men told a group of bar patrons that he had set the fire.

Despite these leads, and despite the fact that there appeared to have been a robbery and break-in (machines

were broken into and one of the windows was broken), there was evidence at trial that the Homestead investigators failed to locate certain key suspects, verify alibis, follow up with witnesses or go to Pennsylvania to determine Zoppo's whereabouts on the morning of the fire. In fact, evidence was presented that when interviewing some of the alleged perpetrators, the investigators did little more than ask cursory questions such as whether they were responsible for the fire. When they answered negatively, their questioning ceased.

The investigators instead focused on the inconsistencies in Zoppo's statements concerning the sequence of events the morning of the fire and on the statement of a bar patron, Dave Pogue. Pogue initially corroborated the theory that the ousted men were responsible for the fire, but he later implicated Zoppo. However, there was evidence that he was paid for this later statement.

Part of Homestead's denial of the claim was based upon its belief that Zoppo had a motive for destroying his building, namely, financial gain. Homestead argued that the bar was overinsured and that it was losing money. However, there was evidence to the contrary. Although Zoppo had purchased the bar six months prior to the fire for $10,000 and had insured it for $50,000, Homestead, in its initial underwriting report, had stated that the building had a market value of $95,798. Furthermore, Zoppo had no debts and had actually made improvements to the bar prior to the fire. Moreover, before the denial of the claim, Zoppo attempted to prevent demolition so that he could rebuild the bar.

Finally, Zoppo's expert, a claims consultant, testified that the Homestead investigation was inadequate and that Homestead was not justified in denying the claim.

Hence, based on the foregoing, we reinstate the trial court's finding of bad faith.

II

Damages

The next issue to be addressed is whether R.C. 2315.21 (C)(2) violates the right to trial by jury. R.C. 2315.21 (C)(2) provides:

"In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta. *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3. The right is guaranteed by Section 5, Article I of the Ohio Constitution. Although the constitutional right to a jury trial is not guaranteed in all cases, the right extends to those causes of action where the right existed at common law. *Sorrell v. Thevenir* (1994), 60 Ohio St.3d 415, 421, 633 N.E.2d 504, 510; *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, paragraph one of the syllabus.

Thus, in analyzing the validity of R.C. 2315.21(C)(2), we must first determine whether there existed a common-law right for a jury to assess the amount of punitive damages.

The English courts first recognized punitive damages in *Wilkes v. Woods* (1763), 98 Eng.Rep. 489. Thereafter, as early as 1791, American juries began awarding punitive damages and assessing their amount. *Corvell v. Colbaugh* (1791), 1 N.J.L. 77. In 1859, the common-law right to have juries award punitive damages was regarded as "settled" in Ohio. *Roberts v. Mason* (1859), 10 Ohio St. 223, 225. In *Roberts*, this court emphasized the importance of the jury's role in determining punitive damages when it stated: "[T]welve intelligent and

impartial men, acting under oath, and subject, in a proper case, to the control of the court, are not likely to do any great wrong; and it seems to us that the power which this rule confers upon a jury, may, in practice, operate as a salutary restraint upon the evil passions of bad men." *Id.*

Prior to the 1987 enactment of R.C. 2315(C)(2), 142 Ohio Laws, Part I, 1661, 1691, juries in this state had the integral role of determining not only when punitive damages were justified but also of assessing the amount of such damages. Clearly, the assessment of punitive damages by the jury stems from the common law and is encompassed within the right to trial by jury. However, the legislature, by enacting R.C. 2315.21(C)(2) and by permitting only the court to determine the amount of punitive damages, has in effect abrogated the common-law right of the jury to assess the amount of punitive damages.

It is well settled that the right to trial by jury " 'cannot be invaded or violated by either legislative act or judicial order or decree.' " *Sorrell v. Thevenir, supra,* 69 Ohio St.3d at 421, 633 N.E.2d at 510, quoting *Gibbs v. Girard* (1913), 88 Ohio St. 34, 102 N.E. 299, paragraph two of the syllabus. Since R.C. 2315.21(C)(2) impairs the traditional function of the jury in determining the appropriate amount of damages, we hold that R.C. 2315.21(C)(2) violates the right to trial by jury under Section 5, Article I of the Ohio Constitution.

Finally, in so ruling, we considered but were unpersuaded by appellee's reliance on *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737. In *Digital,* this court held that a litigant does not have a right to trial by jury to determine the amount of attorney fees. The discussion in *Digital* pertaining to the validity of R.C. 2315.21(C) is merely *dicta* since, in *Digital,* the assessment of punitive damages was not at issue. However, we do reject the reasoning

espoused in *Digital* which treats the right to trial by jury in cases assessing attorney fees the same as the right in cases of punitive damages. *Id.* at 662-663, 590 N.E.2d 742-743. We believe the right to have a jury assess punitive damages differs from the right to have a jury assess attorney fees. With punitive damages, the right stems from common law; however, no such right existed at common law for attorney fees.

We must next determine whether there were sufficient facts presented for the jury to consider an award of punitive damages. In *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298, 525 N.E.2d 783, paragraph two of the syllabus, we stated that: "Punitive damages may be recovered against an insurer that breaches its duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer." In this case, since Homestead did not act fraudulently in denying Zoppo's claim, the question becomes whether Homestead acted with actual malice. "Actual malice" is defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis *sic.*) *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

There is no evidence here of hatred, ill will or a spirit of revenge. Thus, the trial court had the obligation to determine that there was sufficient evidence that Homestead consciously disregarded Zoppo's rights. *Id.* The record reveals a one-sided inquiry by Homestead investigators as to who was at fault. They did not adequately question suspects or follow up on leads. Homestead breached its affirmative duty to conduct an adequate investigation. The award of punitive damages was justified.

Finally, regarding the issue of compensatory damages and attorney fees, we hold that an insurer who acts in bad faith is liable for those compensatory damages flowing from the bad faith conduct of the insurer and caused by the insurer's breach of contract.

However, contrary to appellants' position, an insured is not automatically entitled to interest or attorney fees. An insured who seeks prejudgment interest must follow the specific statutory procedures set forth in R.C. 1343.03. Attorney fees may be awarded as an element of compensatory damages where the jury finds that punitive damages are warranted. *Columbus Finance, Inc. v. Howard* (1975), 42 Ohio St.2d 178, 183, 71 O.O.2d 174, 177, 327 N.E.2d 654, 658.

For the following reasons, we reverse the judgment of the court of appeals on the issues of bad faith and the constitutionality of R.C. 2315.21(C)(2) and reinstate the jury's finding of punitive damages and attorney fees. We remand this cause to the trial court for a hearing for a jury to determine the amount of punitive damages.

Judgment reversed
and cause remanded.

DOUGLAS and RESNICK, JJ., concur.

A.W. SWEENEY, J., concurs in the syllabus and judgment only.

PFEIFER, J., concurs in part and dissents in part.

MOYER, C.J., and WRIGHT, J., dissent.

PFEIFER, J., concurring in part and dissenting in part. I concur with the majority's syllabus paragraphs and the holding in Part I of its opinion. Because this case does not merit the awarding of punitive damages, however, I dissent from the result reached in Part II of the majority's opinion.

The majority concludes that Homestead "consciously disregarded" Zoppo's right to collect for his loss. I disagree. The record indicates that Homestead's investigation was less than thorough, but does not reveal any conscious conduct by Homestead to deprive Zoppo of his insurance benefits. The trial court should not have submitted the issue of punitive damages to the jury.

WRIGHT, J., dissenting. I respectfully dissent from the majority opinion. With respect to Part I, I would continue to apply the test for bad faith as articulated in *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 590 N.E.2d 1228. See, also *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 6 OBR 337, 452 N.E.2d 1315.

I also disagree with the majority's unhappy determination in Part II that R.C. 2315.21(C)(2) is unconstitutional. Though the majority seems determined to declare an important piece of tort reform legislation unconstitutional, I believe that accepted and traditional jurisprudence requires that we reach the opposite result. The analysis used in this matter and other recent cases in which the majority has thwarted the efforts of the General Assembly to accomplish tort reforms bring to mind a marvelous Yiddish proverb: "*az di ershte shure iz krum toyg der gantser briv oyf kapores,* 'If the first line is crooked the whole letter is good for nothing,' or 'Ill begun, all undone.' " [1]

The right to a trial by jury under Section 5, Article I of the Ohio Constitution applies only to those causes of action in which an individual had a right to a jury trial at the time the 1802 Ohio Constitution was adopted. *Willyard v. Hamilton* (1836), 7 Ohio 111, 115-116; *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301. At the time the Ohio Constitution was adopted, plaintiffs had a right to a jury trial for

[1] Samuel, In Praise of Yiddish (1971) 162.

causes of action involving tort. See *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 533 N.E.2d 743. As such, under Seciton 5, Article I, a party has a right to a jury trial in a tort action.

However, appropriate analysis in this case cannot, and should not, end with the broad conclusion that an individual has a jury-trial right with respect to tort actions. This case presents a much narrower question: whether a plaintiff has a right to have a jury decide the amount of a *punitive* damages award. That is the issue and the majority simply fails to come to grips with it.

A right to a jury trial attaches only to those elements of a trial that are fundamental and essential to the jury system. *Tull v. United States* (1987), 481 U.S. 412, 426, 107 S.Ct. 1831, 1840, 95 L.Ed.2d 365, 378; *Colgrove v. Battin* (1973), 413 U.S. 149, 93 S.Ct. 2448, 37 L.Ed.2d 522.[2] Therefore, we must consider whether providing a jury with the authority to determine the amount of punitive damages is essential to the jury system. As the United States Supreme Court stated in *Colgove*:

"'* * * Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. * * *'" *Id.* at 156, 93 S.Ct. at 2452, 37 L.Ed.2d at 528, fn. 11 (quoting Scott, Trial by Jury and the Reform of Civil Procedure [1918], 31 Harv.L. Rev. 669, 671).

It is axiomatic that the purpose of a tort action is to fully compensate the plaintiff. See *Bailey v. Allberry*

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[2] Although these cases are interpreting the Seventh Amendment to the United States Constitution, the similarity between that provision and Section 5, Article I of the Ohio Constitution makes their analyses particularly persuasive. See *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 662, 590 N.E.2d 737, 742, fn. 1.

(1993), 88 Ohio App.3d 432, 624 N.E.2d 279, and *Miller v. Irvin* (1988), 49 Ohio App.3d 96, 550 N.E.2d 501. Given the purpose of a tort action, the fundamental role of a jury is to decide questions of liability and the extent of compensation. For this reason, a plaintiff has a right to have a jury determine liability. I can accept the principle that the compensatory nature of a tort action also extends to provide the plaintiff with a right to have the jury determine the amount of actual damages. See *Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St.3d 601, 612, 597 N.E.2d 474, 482 (actual damages compensate plaintiff for his injury). This conclusion is supported by the proposition that the determination of actual damages relies solely on findings of fact, something for which the jury is uniquely suited. See *Shamblin's Ready Mix, Inc. v. Eaton Corp.* (C.A.4, 1989), 873 F.2d 736, 741.

However, the central issue in this case is whether a plaintiff has a right to a jury determination of the amount of *punitive* damages in a tort action. A review of the appropriate case law leads to the inescapable conclusion that a plaintiff does not have such a right.[3]

The purpose of punitive damages is not to compensate the plaintiff, but rather to punish the defendant. "The policy for awarding punitive damages in Ohio '* * * has been recognized * * * as that of punishing the offending party and setting him up as an example to others that they might be deterred from similar conduct.'" *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335, 512 N.E.2d 1174, 1176 (quoting *Detling v. Chock-*

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[3] Because the statute at issue leaves the determination as to whether a plaintiff is entitled to punitive damages with the jury, we do not need to consider whether a plaintiff has a right to have a jury make that determination. The only issue is whether a plaintiff has right to have a jury determine *the amount* of punitive damages, a responsibility placed by R.C. 2315.21(C)(2) upon the trial court.

ley [1982], 70 Ohio St.2d 134, 136, 24 O.O.3d 239, 240, 436 N.E.2d 208, 209). See *W. Union Tel. Co. v. Smith* (1901), 64 Ohio St. 106, 116, 59 N.E. 890, 892. As such, punitive damages are outside the underlying purpose of a tort action and the essential role of the jury. See *Smith v. Printup* (1993), 254 Kan. 315, 325-326, 866 P.2d 985, 994. The United States Court of Appeals for the Fourth Circuit reached the same result in *Shamblin's Ready Mix, Inc. v. Eaton Corp., supra,* 873 F.2d at 742: "It is clear that the amount of exemplary damages is not a fundamental element of the trial. It is a remedy in the nature of a penalty designed to punish and deter reprehensible conduct."

The nature of the determination of a punitive damages award also requires the conclusion that a plaintiff does not have a right to have a jury determine the amount of punitive damages. Unlike actual damages, which are entirely fact sensitive, the determinations as to the amount of punitive damages contemplates more than the facts at hand in the immediate trial. In order to reach a fair punishment, the decision-maker must be able to compare the wrongful conduct in this case against similar conduct in other cases. Additionally, such a broad perspective is essential in order to set a level of damages which, while fair, will adequately deter such wrongful conduct in the future. This broad perspective, which is necessary to give effect to the purposes of punitive damages, makes the judge and not the jury the appropriate decision-maker. The knowledge and experience necessary to set punitive damages effectively are unique to the judge alone. In fact, the process of determining the amount of a punitive damages award is directly analogous to the sentencing role of a judge in a criminal trial. As such, the discreionary decision as to the amount of punitive damages to award in a particular case is not a "fundamental" element of the jury system. Consequently, a plaintiff does not have a constitutional right to have a jury determine the amount of punitive damages and the

General Assembly has the perfect right to place that responsibility on the judiciary.

In addition, plaintiffs have no general "right" to punitive damages. The language of our cases shows that punitive damages are permissive and not mandatory. As we stated in *Preston, supra*: "Ohio courts, since as early as 1859, *have allowed* punitive damages to be awarded in tort actions which involve fraud, malice, or insult." (Emphasis added.) 32 Ohio St.3d at 334, 512 N.E.2d at 1175. See *Smith v. Printup, supra*, 254 Kan. at 825, 866 P.2d at 994 ("No separate right of action existed at common law for punitive damages."). This conclusion is supported by Justice Scalia, who recently noted: "State legislatures and courts have the power to restrict or abolish * * * punitive damages." *Pacific Mut. Life Ins. Co. v. Haslip* (1991), 499 U.S. 1, 39, 111 S.Ct. 1032, 1054, 113 L.Ed.2d 1, 33 (Scalia, J., concurring). Because the legislature has the authority to abolish punitive damages, it may also regulate them. See *Smith v. Printup, supra*, at 331-332, 866 P.2d at 997-998. As such, the enactment of R.C. 2315.21(C)(2), which gives the trial court the power to determine the amount of punitive damages, was properly within the legislature's authority and is not unconstitutional.

MOYER, C.J., concurs in the foregoing dissenting opinion.

APPENDIX B

THE SUPREME COURT OF OHIO
1995 TERM

To wit: February 15, 1995

Case No. 93-1616

DONALD ZOPPO, *et al.*,
Appellants,

v.

HOMESTEAD INSURANCE CO.,
Appellee.

RECONSIDERATION ENTRY
(Cuyahoga County)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and the same is hereby, denied.

(Court of Appeals No. 62926)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Judge

APPENDIX C

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 62926

DONALD ZOPPO, *et al.*,
Plaintiffs-Appellees

-vs-

HOMESTEAD INSURANCE CO.,
Defendant-Appellant

Civil appeal from Cuyahoga County
Common Pleas Court
Case No. CV-174312

Decision: JULY 8, 1993

JOURNAL ENTRY AND OPINION

AFFIRMED IN PART; REVERSED IN PART:

PATTON, P.J.:

The defendant-appellant, Homestead Insurance Company ("Homestead") appeals from a jury trial verdict for the plaintiff-appellee and cross-appellant herein ("plaintiff") Donald Zoppo. Plaintiff, as insured, brought an action for civil damages against Homestead, its insurer,

for breach of the insurance contract and bad faith for Homestead's denial of plaintiff's claim for loss suffered as the result of a fire which burned down his business establishment, Windy's Bar. Homestead, on appeal, challenges the trial court's jury instructions and also challenges the verdict as being against the manifest weight of the evidence. Homestead further argues its motion for a directed verdict should have been granted.[1]

The relevant facts are as follows: Windy's Bar was badly damaged by fire in the early morning hours of October 13, 1988. The bar was insured six months prior to the fire under a policy of insurance issued by Homestead.

After the fire loss was reported to Edward Synek ("Synek"), an agent of Homestead, an investigaor was immediately employed. Howard Morman ("Morman"), the investigator, testified as to his results.

The results of an initial investigation revealed that the fire was caused by arson. Evidence of an accelerant, such as gasoline, was uncovered and initially determined to have started the fire.

Morman took statements from plaintiff and plaintiff's girl-friend Jerri Garver. Plaintiff told several inconsistent versions of his whereabouts on the night of the fire. Garver also changed details of the night in question.

Homestead, thereafter, engaged a fire investigation expert, James Churchwell ("Churchwell"), in order to determine the cause and origin of the fire. Also, Homestead retained Attorney Harold Reader, who eventually withdrew as counsel during the course of discovery below.

Churchwell concluded his investigation after interviewing neighbors, photographing the scene, speaking with former patrons of the bar, obtaining statements when

[1] Plaintiff's cross-appeal, which assigns four errors for our review, will be addressed separately, *infra*.

deemed necessary, and analyzing the structure and security of the building which housed the bar.

Morman and Churchwell eventually concluded that plaintiff was involved in starting the fire. Attorney Reader's law firm recommended the claim be denied. During discovery, Reader's law firm withdrew as counesl and Homestead employed replacement counsel.

Thereafter, this lawsuit ensued. Plaintiff brought two causes of action against Homestead. The first one was breach of an insurance contract and the second was bad faith in refusing to pay the claim.

Homestead assigns eight errors for our review (see Appendix) and plaintiff cross-appellant assigns four errors.

We find Homestead's arguments to be well-taken and reverse the decision of the trial court on the bad faith claim, award of punitive damages and the award of attorneys fees and enter judgment for Homestead on that claim. We affirm the trial court's judgment on plaintiff's breach of contract claim. Further, we do not find merit to plaintiff's cross-appeal.

Because we hold that Homestead's motion for a directed verdict on the bad faith claim should have been granted, we begin with this assignment of error.

I.

In Homestead's second assignment of error, it argues the trial court should have granted its motion for a directed verdict on the bad faith claim, or in the alternative, its motion for judgment notwithstanding the verdict. We will address the directed verdict because the argument regarding the motion for judgment notwithstanding the verdict is rendered moot by our disposition of the former.

Civ. R. 50(A)(4) sets the standard for motions for a directed verdict:

> (4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

When ruling on a motion for a directed verdict, the court does not involve itself with any weighing of the evidence or question the credibility of the witness when making such a ruling. *Blair v. Property Mgmt. Consultants* (1987), 40 Ohio App.3d 103.

A motion for a directed verdict is to be granted when, construing the evidence most strongly in favor of the party opposing the motion, the trial court finds that reasonable minds could come to only one conclusion and that conclusion is adverse to such party. *The Limited Stores, Inc. v. Pan American World Airways, Inc.* (1992), 65 Ohio St.3d 66.

Recently, the Ohio Supreme Court in *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, clarified the standard upon which a bad faith claim is predicated under Ohio law:

> "* * * we recognize the well-established principle in Ohio that imposes on the insurer a duty to act in good faith in the handling and payment of the claims of its insured. *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 672, 6 OBR 337, 452 N.E.2d 1315, paragraph one of the syllabus. Moreover, as we emphasized in *Hoskins*, '[a] breach of this duty will give rise to a cause of action in tort against the insurer.' *Id.* The tort of bad faith is not a tortious breach of contract, for no matter how willful or malicious the breach, it is no tort to breach a contract.

> See *Ketcham v. Miller* (1922), 104 Ohio St. 372, 136 N.E. 1454. [Footnote omitted.] Rather, the tort of bad faith arises as a consequence of a breach of a duty established by a particular contractual relationship. In the area of contracts of insurance, the legal duty of good faith imposed by law on the insurer applies with equal force to the company's settlement of third-party claims against its insured as it does to those claims brought by the insured himself. *Hoskins, supra,* 6 Ohio St.3d at 275-276, OBR at 340, 4542 N.E.2d at 1319. As stated by the supreme court of California in the landmark case, *Gruenberg v. Aetna Ins. Co.* (1973), 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032:
>
> " 'It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.' *Id.* at 575, 108 Cal.Rptr. at 486, 510 P.2d at 1038."

Id. at 694-5.

It is a general rule of law that the "[m]ere refusal to pay insurance is not, in itself, conclusive of bad faith." *Hoskins, supra,* at 276-277; see, also, *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, paragraph two of the syllabus. The supreme court stated that "there is no precedential authority from any decision of this court that supports the view that bad faith imports negligent behavior by the insurer in handling the claims of its insured." *Motorists Mut. Ins. Co. v. Said, supra,* at 698-99.

Accordingly, the *Said* court held that:

> "* * * a cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim."

Id. at 699-700.

The *Said* court defined "no lawful basis" for the intentional refusal to satisfy a claim as meaning "the insurer lacks a reasonable justification in law or fact for refusing to satisfy the claim." *Id.* at 700. Accordingly, where a claim is "fairly debatable," the insurer can refuse the claim so long as the refusal is premised upon a genuine dispute over either the status of the law at the time of the denial or the facts surrounding the claim. *Id.*

The *Said* court elaborated on the tort of bad faith:

> "In order to demonstrate the tort of bad faith, some form of wrongful intent must be proven. A finding of bad faith involves an inquiry into the insurer's state of mind. *It is not enough that the insurance company exercised poor judgment in withholding coverage; the insurer must, through its actions, or inactions, intentionally refuse to satisfy the insured's claim.* Additionally, when the nature of the insurer's conduct is malicious, such as when it is done for a dishonest purpose, or actual intent to mislead or deceive the insured, or calculated to defeat the insured's claim, then the insurer may be subjected to punitive damages.
>
> As shown above, the duty of an insurance company to its insured is analogous to that of a fiduciary.

> Accordingly, it is the duty of an insurance company to assess claims after an appropriate and careful investigation, and its conclusions should be the result of the weighing of probabilities in a fair and honest way. For an insurance company's decision on a claim to be made in good faith, it must be based upon knowledge of the facts and circumstances upon which liability is predicated. The absence of any diligence concerning a claim and the insurer's refusal to determine the nature and extent of the liability may, in certain instances, evidence bad faith. See *Anderson v. Continental Ins. Co.* (1978), 85 Wis.2d 675, 688, 271 N.W.2d 368, 375."

Id. at 699 (emphasis added).

The evidence adduced at trial revealed that reasonable minds could come to but one conclusion; that being adverse to plaintiff. The evidence revealed that Homestead, upon receiving word of the fire loss at Windy's Bar, employed Howard Mormon, an investigator to investigate the loss. Both Mormon and plaintiff's insurance agent, Synek, arrived on the scene immediately following the fire. It was determined that the fire was set by arson, which fact remained undisputed at trial. Thereafter Mormon began interivewing neighbors and former patrons of the bar. He took formal statements from plaintiff and plaintiff's girlfriend which revealed some material inconsistencies concerning plaintiff's whereabouts at the time of the fire and the time that plaintiff learned of the fire. Several versions were relayed to Mormon from both plaintiff and plaintiff's girlfriend. Mormon became suspicious. He then advised Homestead to employ a fire investigation expert as it was a case of arson accompanied by suspicious characters who could not detail with consistent specificity their whereabouts at the time in question.

James Churchwell began his investigation. He interviewed the fire fighters, photographed the scene and can-

vassed the neighborhood looking for clues. He interviewed neighbors and former patrons. He learned that there were several former patrons who were angry at plaintiff because plaintiff had banned them from the bar approximately five months before the fire. In fact, one of the angry patrons actually stated that he was responsible for the fire but was not believed by the recipient of the statement. Apparently, the person claiming responsibility was intoxicated at the time he made the statement and had a reputation for making outlandish statements.

Churchwell learned that their was an attempted arson approximately three weeks prior to the fire that eventually destroyed the bar. Churchwell concluded his investigation and submitted a comprehensive report to Homestead. In fact, one of plaintiff's expert witnesses agreed that Homestead conducted a very thorough investigation of the fire loss.

The recommendation to Homestead was to deny plaintiff's claim, based upon their complete investigation of the fire loss. Homestead then denied the claim.

The trial transcript is replete with evidence that Homestead conducted a prompt, thorough and fair investigation. There was absolutely no evidence of wrongful intent on the part of Homestead in denying plaintiff's claim. Plaintiff did not produce any evidence that Homestead, through its actions or inactions, *intentionally* refused to satisfy the insured's claim. Plaintiff did not produce any evidence that Homestead's action of denial of plaintiff's claim was malicious, motivated by a dishonest purpose or that Homestead had an actual intent to mislead or deceive the plaintiff. Assuming, *arguendo*, that Homestead even had exercised poor judgment in denying the claim, this does not evidence bad faith. *Said, supra*, 699. Therefore, the trial court should have granted Homestead's motion for a directed verdict on the bad faith claim.

Accordingly, the second assignment of error is well-taken.

II. JURY INSTRUCTIONS

In Homestead's first, fourth, sixth and seventh assignments of error, it argues the trial court gave erroneous jury instructions on bad faith, punitive damages, an award of attorneys fees and in instructing the jury to further deliberate after the general verdict had been rendered.

A trial court shall give only those instructions which constitute a correct statement of the law and which apply to those issues raised by the evidence adduced at trial. *Pallini v. Dankowski* (1969), 17 Ohio St.2d 51, paragraph two of the syllabus. A reviewing court shall not reverse a trial court's judgment based upon error in some portion of a jury charge where the charge, when viewed in its entirety, clearly and fairly expresses the law. *Yaeger v. Riverside Methodist Hosp.* (1985), 24 Ohio App.3d 54, 55-56. Further, a reviewing court may not reverse a trial court's judgment based upon an erroneous instruction unless the record demonstrates that the complaining party suffered substantial prejudice. *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7, 17.

A.

As we have found that the trial court should have granted Homestead's motion for a directed verdict, the assignments of error relative to the trial court's jury instructions are overruled as being moot.

Therefore, the first and fourth assignments of error are overruled as being moot. Consequently, Homestead's third assignment of error, which argued that the trial court erred in not granting Homestead's motion for a directed verdict on the punitive damages issues, is likewise overruled as being moot as we are vacating the verdict on the bad faith issue. R.C. 2315.21(B)(1) & (2).

C.

In Homestead's sixth assignment of error, it argues the trial court erred in the admission of evidence surrounding its claim for attorneys fees. Specifically, Homestead argues the trial court improperly allowed plaintiff's attorney to testify regarding his contingency fee arrangement with his client, the plaintiff, and also improperly instructed the jury on attorneys fees.

"Attorney fees are recoverable as compensatory damages in an action where punitive damages are properly awarded. *Langhorst v. Riethmiller* (1977), 52 Ohio App.2d 137, 6 O.O.3d 101, 368 N.E.2d 328, paragraph three of the syllabus. As such, an award of attorney fees will not be sustained either by the denial or reversal of an award of punitive damages." *Ferritto v. Olde & Co., Inc.* (1989), 62 Ohio App.3d 582, 588.

Ergo, as the result of our disposition of Homestead's second and third assignments of error, we overrule Homestead's sixth assignment of error as being moot.[2]

D.

In Homestead's seventh assignment of error, it argues the trial court erred in instructing the jury to deliberate further after the jury returned its general verdict and

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[2] This court re-emphasizes the factors to be considered in an award of attorney fees:

(1) The time and labor involved in maintaining the litigation;

(2) The novelty, complexity, and difficulty of the questions involved;

(3) The professional skill required to perform the necessary legal services;

(4) The experience, reputation, and ability of the attorneys; and,

(5) miscellaneous litigation expenses.

State ex rel. Montrie Nursing Home, Inc. v. Creasy (1983), 5 Ohio St.3d 124, 128.

written interrogatories. Specifically, Homestead contends that if this court does not vacate plaintiff's verdict on his bad faith claim, then judgment should be reduced by $65,000, the sum awarded as attorney fees, because the trial court improperly sent the jury back for deliberation after the general verdict was rendered to increase the amount by $65,000.

Homestead's argument in its seventh assignment of error is premised upon this court's denial of its second assignment of error on the bad faith claim. As we have found Homestead's second assignment of error to be well-taken, the seventh assignment of error is overruled as moot.

III.

In Homestead's fifth assignment of error, it argues the trial court erred when instructing the jury that emotional distress is an element of damage in bad faith cases.

Although we agree that Ohio does not recognize emotional distress as a damage element in bad faith cases,[3] we need not reach the merits of this assignment as we are reversing the judgment regarding bad faith and entering judgment for Homestead on this issue.

Accordingly, the fifth assignment of error is overruled.

IV.

In Homestead's eighth assignment of error, it argues the verdict is against the manifest weight of the evidence. Due to our earlier disposition of plaintiff's bad faith claim, we need only address the breach of insurance contract claim.

The standard of review was enunciated in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus:

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[3] Plaintiff, in support of his position to the contrary, relies on foreign case law which this court is not bound to adopt.

> "Judgments supported by some competent, credible evidence going to all the elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

Homestead's only argument regarding this particular assignment is that a compelling case of plaintiff's involvement in the fire of Windy's Bar was presented. The jury did not agree. Our review of the record reveals the judgment on the contract claim was supported by at least some competent credible evidence and Homestead is unable to argue the case to the contrary before this court.

Being unpersuaded otherwise, the eighth assignment of error is overruled.

CROSS-APPEAL

I. THE TRIAL COURT ERRED IN FINDING R.C. 2315.21(C)(2) TO BE CONSTITUTIONAL INSOFAR AS IT REQUIRES THE AMOUNT OF PUNITIVE DAMAGES TO BE DETERMINED BY THE COURT INSTEAD OF THE JURY.

This assignment of error addresses the award of punitive damages. Due to our disposition of this issue, plaintiff's assignment of error is rendered moot.

Assuming, *arguendo,* that this argument is not moot, it lacks merit.

R.C. 2315.21(C)(2) reads:

> (2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

As a general rule, "[a]ll legislation enactments enjoy a presumption of constitutionality. *Sedar v. Knowlton*

Constr. Co. (1990), 49 Ohio St.3d 193, 203, citing *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 48. A statute can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt. *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 376.

In this instance, plaintiff has not proved that R.C. 2315.21(C)(2) is unconstitutional beyond a reasonable doubt.

While the seventh amendment to the U.S. Constitution guarantees the right of a jury trial, it does so only as to "fundamental elements" which are "inherent in and of the essence of the system of trial by jury."[4] See, *Tull v. United States* (1987), 481 U.S. 412, 426. The assessment of a civil penalty is not one of these "fundamental elements." *Id.* The amount of civil penalties imposed, after a finding of liability by the trier of fact, may be reserved for the court's determination. See, generally, *Id.; Digital & Analog Design Corp. v. North Supply Co.* (1992), 63 Ohio St.3d 657, 661-662 ("a litigant does not have a constitutional right to trial by jury as to the determination of whether, or in what amount, attorney fees should be awarded in a tort action.").

Accordingly, we hold that plaintiff has not demontrated beyond a reasonable doubt that R.C. 2315.21 (C)(2) is unconstitutional.

The first assignment of error is overruled.

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[4] The seventh amendment provides that, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *."

II. THE TRIAL COURT ERRED BY NOT AWARDING INTEREST ON THE CONTRACT DAMAGES AND BY NOT ALLOWING THE JURY TO CONSIDER INTEREST AS AN ITEM OF DAMAGE.

Plaintiff argues the trial court erred in not instructing the jury that it could award interest on the $80,000 award for breach of the insurance contract or, in the alternative, that the court should have awarded such interest pursuant to R.C. 1343.03(A) from the date of such breach.

R.C. 1343.03(A) reads in relevant part:

> (A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, * * * for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate of ten per cent per annum, and no more, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.

"In considering the award of prejudgment interest under this statute, where the dispute is over liability itself and the amount of such potential liability is not in dispute or is readily ascertainable, the trial court should award prejudgment interest where the plaintiff prevails on the liability issues. *Horning-Wright Co. v. Great American Ins. Co.* (1985), 27 Ohio App.3d 261, 263." *Copeland v. Custom Craft Builders* (Mar. 7, 1991), Cuyahoga App. No. 58075, unreported, at 16-17. "Because the prejudgment interest statute is designed to compensate the aggrieved party for the delay encountered by the failure of the tortfeasor to negotiate in good faith,

the law recognizes as a basis for such interest only those damages that would have been measurable with some degree of certainty prior to trial." *Digital, supra,* at 660.

In this case, the amount of the loss suffered by plaintiff, the actual cash value and the value of other personal property were in dispute and not readily ascertainable. Expert testimony was used to establish the amount of damages incurred as a result of the fire. Ergo, prejudgment interest was properly denied as the amount of damages was not readily ascertainable. See, *Copeland, supra,* at 17; see also, *McKinney v. White Sewing Mach. Co.* (1964), 95 O.L.A. 368.

The second assignment of error is overruled.

III. THE TRIAL COURT ERRED IN ITS JURY INSTRUCTION ON DAMAGES FOR BREACH OF THE DUTY OF GOOD FAITH.

Plaintiff specifically argues the trial court erred in refusing to charge the jury on the items of interest, costs and attorneys fees.

We have already decided that the damages on the breach of contract claim were not readily ascertainable and thus, the evidence did not warrant an instruction or award of prejudgment interest. As we are reversing and remanding the bad faith claim to the trial court, plaintiff's arguments regarding attorneys fees and costs are moot. We are compelled by law to decline plaintiff's invitation to issue an advisory regarding these issues. We note existing case law on these topics and, while interesting, the foreign case law relied upon by plaintiff is not binding on this court.

Accordingly, the third assignment of error is overruled.

IV. THE TRIAL COURT ERRED IN GRANTING A PROTECTIVE ORDER REGARDING THE PRODUCTION OF THE FILES OF THE DEFENDANT'S ATTORNEY ONCE THAT ATTORNEY WAS IDENTIFIED AS A TRIAL WITNESS.

Plaintiff argues the trial court erred in granting Homestead's motion for a protective order with respect to documents in the possession of Attorney Reader, Homestead's former counsel, which were prepared after the commencement of the lawsuit. Plaintiff contends that, by Homestead calling Attorney Reader as a witness, the attorney-client privilege was waived in its entirety and plaintiff was entitled to *all* documents relative to the case with respect to Attorney Reader's representation of Homestead.

R.C. 2317.02 reads in relevant part:

> The following persons shall not testify in certain respects:
>
> * * *
>
> (A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client, except that the attorney may testify by express consent of the client * * *, if the client voluntarily testifies * * *, the attorney may be compelled to testify on the same subject.

"Ohio courts have generally taken a broad view of the scope of the term 'same subject.'" *Walsh v. Barcelona* (1984), 16 Ohio App.3d 470, 471. Essentially, the term "refers to the subject of the controversy about which the client testified." *Id.*

In this case, Attorney Reader testified with respect to the initial claims investigation prior to filing suit. Attorney Reader recommended rejection of plaintiff's claim. This subject was explored at trial. However, plaintiff wished to obtain:

Accordingly, we find no error in the trial court's decision and overrule the fourth assignment of error.

The cross-appeal is without merit.

Judgment affirmed in part with respect to the breach of insurance contract claim.

Judgment reversed in part and vacated as to the bad faith claim. Award of punitive damages and attorneys fees hereby vacated. Judgment entered for Homestead on the bad faith claim.

> All correspondence between Ulmer & Berne [Attorney Reader's law firm] and Homestead Insurance Company regarding this matter.
>
> All correspondence between Ulmer & Berne and any investigator or adjuster working for Homestead Insurance regarding this matter.
>
> All correspondence between Ulmer & Berne and any other person or entity regarding this matter.
>
> All notes of conversation between Ulmer & Berne and any person regarding this matter.
>
> All inter-office communications of Ulmer & Berne regarding this matter.
>
> All bills sent by Ulmer & Berne to Homestead Insurance Company regarding this matter.
>
> All evaluations of this matter made by Ulmer & Berne.

Essentially, plaintiff sought the entire file, including personal notes, observations and assessments. Plaintiff argues his entitlement to these documents as the attorney-client privilege was completely waived.

We find the trial court did not abuse its discretion in granting in part and denying in part Homestead's motion for a protective order. The trial court inspected the requested documents in an *in camera* hearing and con-

cluded that only certain documents were applicable to the bad faith claim. These documents were ordered to be produced. Attorney Reader testified on the same subject of the documents produced and was cross-examined on the same subject in accordance with R.C. 2317.02.

This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed equally.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rule of Appellate Procedure.

PATRICIA A. BLACKMON, J., and
JAMES M. PORTER, J., CONCUR

/s/ John T. Patton
JOHN T. PATTON
Presiding Judge

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX

ASSIGNMENT OF ERROR

I. THE TRIAL COURT'S JURY CHARGE CONCERNING THE ELEMENTS OF THE TORT OF BAD FAITH WAS ERRONEOUS.

II. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' BAD FAITH CLAIM.

III. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES.

IV. THE TRIAL COURT'S JURY CHARGE ON THE ISSUE OF PUNITIVE DAMAGES WAS ERRONEOUS.

V. THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY TO CONSIDER EMOTIONAL DISTRESS AS AN ELEMENT OF DAMAGES.

VI. THE TRIAL COURT ERRED IN THE ADMISSION OF EVIDENCE OF A CONTINGENCY FEE AGREEMENT AND IN THE JURY CHARGE CONCERNING ATTORNEYS' FEES.

A. THE TRIAL COURT ERRED WHEN IT PERMITTED EVIDENCE OF THE CONTINGENCY FEE AGREEMENT.

B. TH TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY REGARDING THE DETERMINATION OF THE AMOUNT OF ATTORNEYS FEES.

VII. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO DELIBERATE FURTHER AFTER THE JURY RETURNED ITS GENERAL VERDICT AND WRITTEN INTERROGATORIES.

VIII. THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

APPENDIX D

ENTRIES OF THE TRIAL COURT

Case No. 174312

JUDGE MICHAEL GALLAGHER

DONALD ZOPPO, *et al.*

v.

HOMESTEAD INSURANCE COMPANY

Date Signed: 09/06/91

Date Entered on Court's Docket: 09/10/91

The Trial Court's entry reads as follows:

Jury having returned a verdict in favor of Plaintiffs and against Defendant on Plaintiff's contract claims in the amount of $80,000 and a verdict in favor of Plaintiffs and against Defendant on Plaintiffs' Bad Faith claim in the amount of $187,800 with a further finding that Plaintiffs are entitled to punitive damages the Court enters judgment as follows: Judgment for Plaintiffs and against Defendant in the amount of $267,800.00 as and for compensatory damages. Judgment for Plaintiffs and against Defendant in the amount of $50,000.00 as and for punitive damages. Costs to Defendant.

/s/ Michael Gallagher
Judge

Case No. 174312

JUDGE MICHAEL GALLAGHER

DONALD ZOPPO, *et al.*

v.

HOMESTEAD INSURANCE COMPANY

Date Signed: 11/13/91

Date Entered on Court's Docket: 11/15/91

The Trial Court's entry reads as follows:

Plaintiff's Motion to Tax Costs filed on 9-25-91 is hereby granted in part, denied in part, Plaintiff's expenditure of $491.60 as itemized in Exhibits A and D is to be taxed as costs. Plaintiff's Motion For Prejudgment Interest filed on 9-25-91 is hereby denied.

/s/ Michael Gallagher
Judge

Case No. 174312

JUDGE MICHAEL GALLAGHER

DONALD ZOPPO, *et al.*

v.

HOMESTEAD INSURANCE COMPANY

Date Signed: 11/13/91

Date Entered on Court's Docket: 11/15/91

The Trial Court's entry reads as follows:

Plaintiff's Motion To Set Hearing To Determine Punitive Damages filed on 9-25-91 is hereby denied as moot. Court has already made punitive damages award. Defendant Homestead Insurance Company's Motion for Judgment Notwithstanding The Verdict, or, In The Alternative, For A New Trial filed on 9-24-91 is hereby denied.

/s/ Michael Gallagher
Judge

APPENDIX E

IN THE SUPREME COURT OF OHIO

Case No. 93-1616

DONALD ZOPPO, *et al.*,
Plaintiffs-Appellants

vs.

HOMESTEAD INSURANCE COMPANY,
Defendant-Appellee

Appeal from the Eighth Appellate District
Cuyahoga County, Ohio

Case No. 62926

DEFENDANT-APPELLEE'S MOTION FOR RECONSIDERATION

Pursuant to Rule XI of the Rules of Practice of the Supreme Court of Ohio, appellee Homestead Insurance Company moves the Court for reconsideration of the decision announced in this matter on December 30, 1994. Homestead does not request that the syllabus of the case be altered in any respect.

Two grounds are urged for reconsideration. First, the terms of the Court's disposition and remand of the punitive damage claim should be reconsidered. Second, this Court's mandate remanding this case should direct that the case be remanded to the Court of Appeals for the

Eighth Appellate District for consideration of the assignments of error previously raised in the Court of Appeals by Homestead but not decided by the Court of Appeals. The case should not be remanded directly to the trial court, as is indicated in the Court's opinion announced on December 30, 1994.

A Memorandum in support of this Motion is annexed.

/s/ Alan M. Petrov
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Of Counsel:

GALLAGHER, SHARP, FULTON
& NORMAN

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

We are mindful of the instruction contained in Rule XI, Section 1, of this Court's Rules of Practice. This Motion for Reconsideration will not reargue the merits of the appeal. We accept that this Court has determined that the court of appeals was in error regarding the standard of bad faith and the constitutionality of R.C. § 2315.21.

We request reconsideration for two reasons. First, the Court's opinion of December 30, 1994 discusses the "actual malice" requirement for punitive damages as expressed in *Preston v. Murty*, 32 Ohio St.3d 334 (1987), and assumes that the basis for awarding punitive damages below was a jury finding of actual malice. In point of fact, the jury awarded punitive damages not because it found actual malice, but because it concluded that Homestead had "insulted" Mr. Zoppo. The adequacy of such a finding as a basis for punitive damages was appealed by Homestead, but the assignment of error was deemed moot by the Court of Appeals when it found that Homestead's motion for a directed verdict on the bad faith claim should have been granted. The case should therefore be remanded to the Court of Appeals for consideration of the propriety of the trial court's ruling and jury charge on the issue of punitive damages, not merely for a trial as to the amount of punitive damages to be assessed.

Second, we believe that both due process requirements of the Federal and state constitutions and the interests of the orderly and fair administration of justice require that the case be remanded to the Court of Appeals for consideration of other assignments of error that were properly raised by Homestead in its appeal to that court, but were not addressed by the Court of Appeals because its disposition of the appeal rendered them moot. Those assignments of error are no longer moot, in light of this

Court's opinion of December 30, 1994, and should be addressed upon remand.

II. LAW AND ARGUMENT

A. This Case Should Be Remanded To The Court Of Appeals To Address Homestead's Two Assignments Of Error Regarding The Punitive Damage Award.

Homestead does not dispute that punitive damages may be awarded against an insurer when its handling of an insured's claim evidences fraud or actual malice. This Court's decision of December 30, 1994, appropriately observes that "[i]n this case, since Homestead did not act fraudulently in denying Zoppo's claim, the question becomes whether Homestead acted with actual malice." This observation is consistent with well-established precedent from this Court. *See, Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 471 (1981); and cases cited in *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St. 3d 690, 695-698 (1992).

Nor is there any dispute that the standard of "actual malice" to be applied was defined by this Court in *Preston v. Murty*, 32 Ohio St. 3d 334 (1987). The December 30, 1994 opinion of this Court correctly concludes that "[t]here is no evidence here of hatred, ill will or a spirit of revenge." The opinion is also correct in observing that "the trial court had the obligation to determine that there was sufficient evidence that Homestead consciously disregarded Zoppo's rights."

The trial court has already made such a determination. It made that determination at trial. The trial court found that there was no evidence of actual malice.[1]

During the trial of this matter, the trial court judge addressed, on the record, Homestead's motion for a directed verdict on the issue of punitive damages. (Vol.

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[1] This ruling by the trial court was never appealed by Zoppo to either the Court of Appeals or to this Supreme Court.

II, Tr. 871-878) In doing so, the trial court expressly found that there was no evidence of malice as that concept was defined in this Court's opinion of *Preston v. Murty*, 32 Ohio St. 3d 334 (1987). Yet, the trial court denied Homestead's motion for a directed verdict because the judge erroneously interpreted R.C. § 2315.21 as expanding the availability of punitive damages and allowing recovery of punitive damages for conduct which was merely "oppressive" and "insult[ing]" [2]

The trial court's reasoning for denying Homestead's motion for directed verdict on the punitive damage issue was stated on the record as follows:

> So I am going to deny the motion for a directed verdict on the punitive damages issue, because of the new Tort Reform Law. I feel that if it were not for the new Tort Reform Act, I would have to grant the motion. I don't see actual malice here. I don't think there is any ill will, spite or revenge on behalf of the insurance company, but whether or not they oppressed or insulted Mr. Zoppo, I think that's a different question. I mean, you would have to take it up with the Legislature. They passed this. That's what they say that entitles you to punitive damages, and that's what I got to go by. If it was on prior common law, I would grant your motion on the punitive damage issue, but since the standard has changed, I think the evidence is bare bones there. I don't think it's strong. I think it's possible on the evidence that the jury can find oppression or insult for those reasons, and I also don't feel I am the proper court to declare this statute unconstitutional.

(Vol. II, Tr. 877-878).

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[2] This Court has been cautious in the past to distinguish between conduct which is reckless, which does not warrant imposing punitive damages, and actual malice, which does. *See, Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St.3d 470, 473-475 (1991); *Schellhouse v. Norfolk & Western Ry. Co.*, 61 Ohio St.3d 520, 525 n. 2 (1991).

Further, the trial court's charge to the jury on the issue of punitive damages did not require the jury to find a conscious disregard of Zoppo's rights in order to assess punitive damages. The jury was charged that punitive damages could be awarded upon a finding of "oppression" or "insult." (Vol. III, Tr. 1436-1437) (R. 483-484)[3] It is presumed that the jury followed the trial court's instruction. *See, Pang v. Minch,* 53 Ohio St.3d 186 (1990), paragraph four of the syllabus. In fact, the jury answered the sole interrogatory on the punitive damages issue by circling "*insult*" as the grounds for its decision. (Vol. III, Tr. 1456-1457) (R. 503-504).[4]

Following the trial court's entry of judgment in favor of Plaintiff on the jury verdict, Homestead filed a motion for judgment notwithstanding the verdict. Homestead argued, *inter alia,* that punitive damages could not be awarded in the absence of malice. That motion was denied.

On appeal to the Cuyahoga County Court of Appeals, two of Homestead's eight assignments of error dealt with the punitive damage award:

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[3] The trial court's instruction defined "oppression" and "insult" as follows:

> Oppression: Oppression means an excessive or cruel exercise of authority or power.
>
> Insult: Insult means to behave with pride or arrogance. It also means to treat with insolence or dignity or contempt.

(Vol. III, Tr. 1437) (R. 484).

[4] The trial court read the jury's answer to the relevant interrogatory into the record:

> Interrogatory No. 5: Do you find that Don Zoppo has proven by clear and convincing evidence that Homestead Insurance acted with malice, oppression, or insult during the handling of his insurance claim?
>
> They answered yes, and also circled "insult." And it's signed by the same seven, and not signed by Juror No. 8.

(Vol. III, Tr. 1456-1457) (R. 503-504).

Third Assignment of Error:

The Trial Court Erred In Denying The Defendant's Motion For A Directed Verdict On Plaintiff's Claims For Punitive Damages.

Fourth Assignment of Error:

The Trial Court's Jury Charge On The Issue of Punitive Damages Was Erroneous.

Because the Court of Appeals ruled that Homestead's motion for a directed verdict on the Plaintiff's claim of bad faith should have been granted, the Court of Appeals never decided Homestead's third and fourth assignments of error. The Court of Appeals, pursuant to App. R. 12(A)(1)(c), determined that these two assignments of error, along with many others, were rendered "moot" by the decision to enter judgment in favor of Homestead on the underlying bad faith claim.

In his appeal to the Ohio Supreme Court, Plaintiff never designated any assignment of error regarding the applicable standard for punitive damages in the context of a bad faith claim or whether an award of punitive damages was supported by the evidence in this case. Because the Court of Appeals never addressed Homestead's third and fourth assignments of error, Homestead had no grounds for cross-appealing from the Court of Appeals' decision in regard to those assignments of error to this Court.

Consequently, none of the briefs filed in this Court during the pendency of this appeal ever addressed the issues of 1) whether a punitive damage award was appropriate and supported by the evidence of the case or 2) whether punitive damages can be awarded for conduct which is merely "insult[ing]."

Despite the history of the punitive damage issue in this case, the lack of an appeal to this Court on the issue by

Zoppo and an absence of briefing,[6] this Court has decided that the jury's award of punitive damages to the Plaintiff was supported by the evidence. This Court's review of the issue, however, did not address the standard set forth in the court's jury charge and in the express finding by the jury in its answer to Interrogatory No. 5. This Court employed the standard of malice set forth in *Preston, supra.* The trial court permitted the jury to employ a standard of mere "insult" or "oppression" in justifying its punitive damage award.

Before punitive damages can be assessed against Homestead or any other defendant, there must be a determination by a finder of fact of "actual malice." No such determination was ever made by the finder of fact in this case. Unless this case is remanded to the Court of Appeals for consideration of Homestead's assignments of error on the punitive damage issue (or to the trial court for a new trial on the punitive damage claim) this Court will have, in effect, directed a verdict in Zoppo's favor on the issue of actual malice. Zoppo never requested a directed verdict on the issue. No finder of fact has ever determined that Homestead consciously disregarded Zoppo's rights.

The Supreme Court does not decide issues of fact upon review, nor will this Court extract a finding of fact from a trial court's record where no such finding was made in the trial court. *See, In re Guardianship of Rudy,* 65 Ohio St.3d 394, 396 (1992); *Prudential Ins. Co. v. Joyce Bldg. Realty Co.,* 143 Ohio St. 564, 567 (1944). There was no finding of malice here.

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[6] In *C. Miller Chevrolet v. Willoughby Hills,* 38 Ohio St. 2d 298, 301 n. 3 (1974), this Court noted that "[i]n fairness to the parties, a Court of Appeals which contemplates a decision upon an issue not briefed should, as the Court of Appeals in this case did give the parties notice of its intention and an opportunity to brief the issue." *See also, State v. 1981 Dodge Ram Van,* 36 Ohio St. 3d 168, 170 (1988).

Consequently, reinstatement of the punitive damage award cannot occur until Homestead's third and fourth assignments of error are properly addressed. The disposition of the punitive damage issue should be reconsidered. This case should be remanded to the Court of Appeals so that a review of Homestead's third and fourth assignments of error can take place.

B. This Case Should Be Remanded To The Court of Appeals To Address Homestead's Three Assignments of Error Regarding Compensatory Damages and Attorney Fees.

In addition to the two assignments of error advanced by Homestead relating to the jury's award of punitive damages, the Court of Appeals also declined to address, on grounds of mootness, Homestead's fifth, sixth and seventh assignments of error.[6] These assignments concern the appropriateness of certain evidentiary rulings and instructions to the jury regarding items of compensatory damages and attorney fees, including an instruction to the jury to deliberate further after returning its general

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[6] *FIFTH ASSIGNMENT OF ERROR*

The Trial Court Erred When It Instructed The Jury To Consider Emotional Distress As An Element Of Damages.

SIXTH ASSIGNMENT OF ERROR

The Trial Court Erred In The Admission of Evidence Of A Contingency Fee Agreement And In The Jury Charge Concerning Attorneys' Fees.

A. The Trial Court Erred When It Permitted Evidence Of The Contingency Fee Agreement.

B. The Trial Court Erred In Its Instruction To The Jury Regarding The Determination Of The Amount Of Attorney Fees.

SEVENTH ASSIGNMENT OF ERROR

The Trial Court Erred In Instructing The Jury To Deliberate Further After The Jury Returned Its General Verdict And Written Interrogatories.

verdict and answers to interrogatories, despite the fact that there was no inconsistency between the jury's general verdict and interrogatory answers. The Court of Appeals found these assignments of error to be moot, but they are moot no longer. The case should be remanded to the Court of Appeals with the instruction to consider them now.

The effect of this Court's December 30, 1994 decision is to reinstate entirely the judgment awarding compensatory damages to Plaintiff in the amount of $187,800 on the bad faith claim. This judgment consists of $122,800 in compensatory damages and $65,000 in attorney fees. The propriety of these damages was the subject of these three assignments of error. This judgment cannot be properly reinstated without giving Homestead an opportunity for actual and meaningful appellate review of its fifth, sixth and seventh assignments of error, all of which attacked the judgment, all of which were properly preserved and presented by Homestead, all of which were deemed moot, and all of which are moot no longer.

In its fifth assignment of error, Homestead argued that the trial court erred when it instructed the jury to consider emotional distress as an element of damages. Emotional distress is not an element of damage to be considered in a claim for bad faith. *See, Columbus Finance v. Howard,* 42 Ohio St.2d 178 (1975), paragraph two of the syllabus. And even if emotional distress could properly be considered in bad faith cases generally, the absolute dearth of evidence in this case as to any real emotional distress should have precluded any consideration of emotional distress by the jury.

The court improperly instructed the jury to consider plaintiffs' emotional distress to determine damages. Without defining emotional distress, the court instructed the jury:

> Now, in determining the actual amount of the compensatory damages on plaintiff's bad faith claim,

> you are to consider the emotional distress of the plaintiff caused by the insurer's misconduct . . . (Vol. III, Tr. 1435-36) (R. 482-483).

Prior to the giving of this instruction, Homestead had objected to the inclusion of emotional distress as a damage element (Vol. III, Tr. 1322-24) (R. 455-456). During discussions regarding the proposed jury instructions, the court had acknowledged there was insufficient evidence to support a claim of damages due to emotional distress. The trial court commented that he had heard no evidence of mental distress (Vol. III, Tr. 1289) (R. 422). This comment was quite correct, but the trial court nevertheless gave an instruction that required the jury to consider Zoppo's emotional distress.

Counsel for plaintiff had attempted to elicit testimony from the plaintiff regarding emotional distress, but Zoppo could not provide any testimony as to impaired function, depression, or a debilitating mental condition. Mr. Zoppo's sole testimony to support damages for emotional distress was as follows:

> Q. The last three years, up until this trial started, have you thought about the insurance company's actions?
>
> A. I think about it all the time.
>
> Q. How has it affected you, Don?
>
> A. It affected me a lot.
>
> Q. Well, you got to tell the jury, Don. They can't read your mind.
>
> A. Well, that was everything I had, and I got it all torn down and everything for something I didn't do. (Vol. II, Tr. 710-711)

This testimony is insufficient to establish emotional distress even if emotional distress was an element of damages for a bad faith claim. No psychologist, friend

or relative came into court to testify regarding any change in Mr. Zoppo's demeanor, any symptoms of severe or debilitating dysfunction, or any other possible evidence that Mr. Zoppo was unable to cope with serious mental distress. *See Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983); *Yeager v. Local Union 20*, 6 Ohio St. 3d 369 (1983). *See also, Hartory v. State Auto Mut. Ins. Co.*, 50 Ohio App.3d 1 (1988). Homestead is entitled to a meaningful review of its assignment of error concerning emotional distress before the damage verdict based upon a claim of emotional distress can be permitted to stand.

In its sixth assignment of error, Homestead argued that the trial court had erred in the admission of evidence and its instruction to the jury regarding the issue of attorney's fees. Plaintiffs' attorney was improperly permitted to testify regarding his contingency fee arrangement with Mr. Zoppo (Vol. II, Tr. 840) over the objection of defendant Homestead (Vol. II, Tr. 830-836). The Ohio Supreme Court has expressly identified the factors to be considered when awarding attorney fees in *State ex rel. Montrie Nursing Home, Inc. v. Creasy*, 5 Ohio St. 3d 124, 128 (1983).

> If the court below ultimately finds that attorney's fees are proper under these circumstances, the court will consider the following factors in arriving at the amount of allowable fees: (1) the time and labor involved in maintaining this litigation, (2) the novelty, complexity, and difficulty of the questions involved, (3) the professional skill required to perform the necessary legal services, (4) the experience, reputation, and ability of the attorneys, and (5) the miscellaneous expenses of this litigation.

The Ohio Supreme Court instructed the Court of Appeals on remand to award fees based upon a determination of reasonable compensation and further ordered "the court shall not award simply a percentage of the fund as attorney's fees." *Id. See also, Hutchinson v. J.C.*

Penney Cas. Ins. Co., 17 Ohio St.3d 195, 200 (1985). Contingency fee arrangements are not relevant proof of the value of the attorney's work.

In the absence of competent evidence of the value of the legal services rendered, a jury's award of attorney fees cannot be supported. *See Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 41 (1989) (award of attorney fees was reversed and remanded where there was "no substantive evidence contained in the trial record concerning the value of appellee's attorney fees in accordance with the *Hutchinson* rationale").

Since plaintiff Zoppo's only evidence of the value of his attorney's work was his own attorney's testimony which included a disclosure of the contingency fee agreement, the evidence did not conform with the requirements set forth by the Ohio Supreme Court.

The court's charge to the jury for the determination of attorney fees also deviated from the factors set forth by the Ohio Supreme Court. The trial court below instructed the jury upon a fifth factor to be considered "the customary and usual fee for such legal services" (Vol. III, Tr. 1437-1438) (R. 484-485). Attorney Rutter had been permitted to testify that there was a contingency fee agreement for 32 percent of the gross amount recovered and that this was "a reasonable and standard amount to charge for the representation of an individual" (Vol. II, Tr. 840). The trial court then denied defendant Homestead's request that the jury be instructed that a contingency fee agreement is not the reasonable measure for the determination of attorney's fees (Vol. III, Tr. 1443) (R. 490).

Homestead is entitled to a review of the assignment of error relating to the attorney's fee issue. This assignment of error was properly preserved and presented to the Court of Appeals, was found by that court to be moot, but is moot no longer.

Finally, Homestead's seventh assignment of error claims that the trial court erred in instructing the jury to deliberate further after the jury returned its general verdict and written interrogatories.

On at least three occasions the trial court instructed the jury that an attorney's fee could be awarded as an element of compensatory damages on the bad faith claim if punitive damages were assessed. Before plaintiffs' attorney testified about the contingency fee agreement, the trial court provided a narrative explanation to the jury as to why a trial attorney was taking the witness stand. The court explained:

> In the event that you award punitive damages in this case, then the attorney fees of Mr. Rutter become an element of compensatory damages on the bad faith claim. (Vol. II, Tr. 837)
>
> So in the event you would indicate to me punitive damages should be awarded, then you are to include Mr. Rutter's fees and the compensatory damages on the bad faith claim. (Vol. II, Tr. 838)

This instruction was repeated at the time of the court's general charge to the jury. As part of its instructions to the jury, the trial court reiterated:

> Now, if you find that plaintiff is entitled to punitive damages, then and only then you may, but are not required to include plaintiff's financial attorney fees as part of the compensatory damages award, in plaintiff's bad faith claim. (Vol. III, Tr. 1437) (R. 484).

The jury panel returned a General Verdict form finding for plaintiff "on plaintiff's bad faith claim against defendant in the amount of $122,800." (Vol. III, Tr. 1459) (R. 506). Consistent with that verdict form, the jurors answered Special Interrogatory No. 4 as follows:

> What amount of money is Donald Zoppo entitled to from Homestead Insurance Company as a direct and

proximate result of Homestead's failure to act in good faith?

Answer: *$122,800.*

(Vol. III, Tr. 1456-1459) (R. 503-506)

Upon receiving and reviewing the jury's verdict and answers to interrogatories, the court improperly instructed the jury to deliberate further and to reconsider its responses. The court vacillated on the issue, first concluding that there should be no further deliberation and subsequently changing its conclusion. The court ultimately instructed the jury that the verdict form and the response to Interrogatory No. 4 should be increased to $187,800 if the jury wished the attorney fees on top of, in excess of, the $122,800 award (Vol. III, Tr. 1460-67) (R. 507-514). It was error for the trial court to do so.

Only where the general verdict and written interrogatories are "inconsistent" is the trial court authorized to order further deliberations. *See, Becker v. BancOhio National Bank*, 17 Ohio St.3d 158 (1985). Answers to interrogatories and general verdicts are inconsistent only when there is no plausible way to reconcile one with the other. *See, Otte v. Dayton Power & Light Co.*, 37 Ohio St.3d 33, 41 (1988); *Hogan v. Finch*, 8 Ohio St.2d 31 (1966).

Because an attorney fee award is an item of compensatory damage on the bad faith claim, the verdict form and interrogatory response were perfectly consistent when they each awarded $122,800 for all damages on the bad faith claim. Because there was no inconsistency, the instruction to increase the award was not permitted by Civil Rule 49(B) and provided a windfall to the plaintiff in the amount of $65,000.

Homestead properly preserved this error on the record and properly raised its assignment of error in the Court of Appeals. Homestead argued that if the judgment on

the bad faith claim is proper after all, then the amount of the bad faith judgment, including attorney's fees, should be $122,800. The original verdict form and interrogatory responses were consistent, the jury should not have deliberated further, and the damage award should not have been increased. This assignment of error, like the others, was deemed moot by the Court of Appeals, but it is moot no longer. The case should be remanded for meaningful appellate review of Homestead's seventh assignment of error.

None of these three assignments of error were ever addressed by the Court of Appeals in its decision of July 8, 1993. Each of them were found to be moot. This Court's entertainment of this appeal did not and could not resolve them. Each assignment of error is critical to the issue of whether the trial court's judgment in the amount of $187,800 is proper. Reinstatement of that judgment amount cannot properly occur until those assignments of error have been properly addressed. They should be addressed upon remand to the Court of Appeals.

C. Constitutional Due Process Requirements, As Well As Judicial Precedent And The Rules Of Appellate Procedure, Guarantee Homestead A Meaningful Review Of All Its Assignments Of Error.

Prior to the July, 1992 amendment to App. R. 12(A), a Court of Appeals was required to address all assignments of error raised by the parties, even those assignments of error which were in effect rendered moot by the disposition of another assignment of error by the Court of Appeals. *See, Criss v. Springfield Twp.*, 43 Ohio St. 3d 83 (1989).

However, in July, 1992, App. R. 12 was amended and reorganized. Division (A)(1)(c) of the rule was added. App. R. 12(A)(1)(c) now permits a court of appeals,

as the Court of Appeals did in this case, to decline to decide assignments of error which are made moot by the court's ruling on other assignments of error. This change, however, was not intended to have the effect, as it will have in this case absent reconsideration, of depriving an appellant of the right to have its assignments of error addressed in a meaningful way should the decision of the court of appeals subsequently be reversed by this Court.

In fact, this very scenario was contemplated when App. R. 12(A) was amended. The Staff Note to the July 1, 1992 Amendment to App. R. 12(A), in relevant part, states as follows:

> Requiring a court of appeals to rule on an assignment of error it finds moot in light of its ruling on another assignment is not in the interest of judicial economy. The principal reason for requiring the court of appeals to rule on an assignment of error it considers moot is that if the case is reviewed by the Supreme Court and if the Supreme Court wishes to review the claimed error, it may be helpful to the Supreme Court to have the court of appeals' ruling on the assignment of error. That is likely to happen, however, only if the court of appeals grants a reversal on one assignment of error, treats other issues as moot in light of that reversal, review is sought in the Supreme Court, and the Court rejects the court of appeals' reversal on the assignment of error, but then wishes to consider other assignments of error raised by the appellant to determine whether the original judgment should be reversed on one of those assignments of error. In this situation, if the Supreme Court wants the court of appeals to rule on the assignment of error before it does, it can remand the case for that purpose, as it did in *Criss*. While that may delay the ultimate resolution in that case, the situation is not likely to arise often enough to justify requiring the court of appeals in every case to rule on every assignment of error it finds moot.

The goal of advancing judicial economy which was the purpose for the 1992 amendment to App.R. 12(A) is laudatory. The interests of judicial economy, however, must yield to the requirements of due process, and App.R. 12(A) cannot be interpreted or applied in a fashion that peremptorily [sic] and unceremoniously eradicates the due process right of an appellant to receive proper consideration of all its assignments of error.

Before this Court can reinstate the trial court's judgment in regard to the compensatory damage and attorney fee awards, Homestead's fifth, sixth and seventh assignments of error need to be addressed and decided. Before the punitive damage award can be reinstated, Homestead's third and fourth assignments of error need to be addressed in a meaningful manner and decided. They are not moot. This Court should remand this case to the Court of Appeals for a decision on those assignments of error. *See, Criss, supra. See also, Danner v. Medical Center Hospital,* 8 Ohio St. 3d 19, 20 (1983); *Dougherty v. Torrence,* 2 Ohio St. 3d 69, 71 (1982); *Smith v. Jaggers,* 33 Ohio St. 2d 1, 2-3 (1973).

As was noted by the Supreme Court when it decided the case *Lumbermen's Alliance v. American Excelsior Corp.*, 33 Ohio St. 2d 37, 39-40 (1973):

> Appellant thus found himself in a position of having to prepare an appeal to this court without ever having been given any reason or reasons for the ruling concerning his motions for discovery, other than that the assignment of error was "without merit." Having been given no reason, appellant had to speculate as to what obstacles, legal or otherwise, need be overcome in his appeal to this court. It is a purpose of App.R. 12(A) to avoid a need for such speculation on the part of *all* parties concerned, this court included.

A litigant has a constitutional right to due process in the entertainment of the issues and assignments of error

raised on appeal. *See, Aetna Life Insurance Co. v. Lavoie,* 475 U.S. 813 (1986); *Ziegler v. Wendel Poultry Serv., Inc.,* 67 Ohio St. 3d 10, 22-23 (1993). Both the 14th Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law which affords a litigant the full and fair opportunity to be heard in a meaningful way. *See, Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.,* 28 Ohio St. 3d 118, 124-125 (1986). In order to ensure that due process of law is observed, an appellant must be afforded a full hearing on the merits of his appeal. *See, Wise v. Gursby,* 66 Ohio St. 2d 241, 244 (1981). Due process is denied when a court reinstates a damage award without giving the party against whom the award is made an adequate opportunity to be heard as to the appropriateness of the reinstated damage award. *See, Ross v. Meyers,* 883 F.2d 486, 490 (6th Cir. 1989) (court violated due process when it reinstated punitive damage award, which had previously been found to be excessive, without notice to defendant and an opportunity to be heard.)

In this case, reinstatement by this Court of the judgment for punitive damages, compensatory damages and attorney's fees, without giving Homestead the opportunity to have the Court of Appeals first decide the relevant assignments of error, will deprive Homestead of due process. *See,* Ohio Constitution Article I, § 16; U.S. Constitution, Amendment XIV. In order to avoid this unfair and unintended result, this case should be remanded to the Court of Appeals so that it can pass upon the merits of those unresolved assignments of error.

This Court has repeatedly held that courts in this state should not deprive a party in an appeal of the substantial right to have the issues in the case decided on the merits, even where the party has failed to observe certain procedural rules on appeal. *See, Hawkins v. Marion Correctional Institute,* 28 Ohio St. 3d 4 (1986) (failure to file brief on time); *State v. Herzig,* 18 Ohio St. 3d 337 (1985) (defect in mode of service of brief); *DeHart v.*

Aetna Life Ins. Co., 69 Ohio St. 2d 189 (1982) (defect in regard to request in praecipe for transcript of proceedings); *Cobb v. Cobb*, 62 Ohio St. 2d 124 (1980) (failure of appellant to secure transmission of record on appeal).

In *DeHart, supra*, this Court observed:

> Initially, in evaluating the propriety of the Court of Appeals' action, we hasten to emphasize—indeed re-emphasize—that it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits.

69 Ohio St.2d at 192.

Homestead, unlike the parties in the above cited cases, is guilty of no such infraction of any procedural rule of this or any other court. Homestead has properly preserved all assignments of error and presented them in a timely and cogent manner to the Court of Appeals for its consideration. It would be unconscionable and a clear denial of due process for Homestead to be deprived of meaningful appellate review of critical assignments of error concerning improper evidentiary and legal rulings by the trial court, incorrect jury instructions, and other prejudicial actions taken by the trial court after the jury's verdict was first announced. *See DeHart, supra*, at 193 ("Fairness and justice are best served when a court disposes of a case on the merits.")

Fairness, justice and due process will not be served here if multiple assignments of error are not considered upon remand. This case should be remanded to the Court of Appeals to decide those assignments of error raised by Homestead previously considered moot by the Court of Appeals.

III. CONCLUSION

Appellee Homestead Insurance Company respectfully prays that its Motion for Reconsideration be granted. Appellee does not request the Court to alter the syllabus of the case or reconsider its decision to reverse the judge-

ment of the Court of Appeals. Appellee does request that this Court's opinion and mandate confirm that the cause be first remanded to the Court of Appeals for consideration of Appellee's assignments of error which were declared "moot." In the alternative, should the Court conclude that the remand should be to the trial court, the remand should be with the instruction to hold a new trial on Plaintiffs' bad faith claim, including the amount of compensatory damages, attorney's fees and all aspects of Plaintiffs' punitive damage claim.

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APPENDIX F

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

Case No. 62926

Lower Court Case No. CP CV-174312
Common Pleas Court

DONALD ZOPPO, *et al.*,
Plaintiff-appellees

vs.

HOMESTEAD INSURANCE COMPANY,
Defendant-appellant

BRIEF OF DEFENDANT-APPELLANT

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DONALD ZOPPO, *et al.*,
Plaintiff-appellees

vs.

HOMESTEAD INSURANCE COMPANY,
Defendant-appellant

BRIEF OF DEFENDANT-APPELLANT

I. STATEMENT OF FACTS

In the early morning hours of October 13, 1988, Windy's Bar was badly damaged by fire. Windy's was owned and operated by plaintiff Donald Zoppo. It was insured pursuant to a policy of fire insurance issued by defendant Homestead Insurance Company ("Homestead") only six months before the fire.

The fire loss was reported to Homestead by Mr. Zoppo's insurance agent, Edward Synek, on the morning of October 13. Homestead immediately engaged Howard Morman, who was acknowledged by one of plaintiffs' witnesses as "the best investigator there is in the Greater Cleveland area," to investigate the loss (tr. 445). Both Mr. Synek and Mr. Morman arrived on the scene around noon on October 13 and began to adjust the loss (Vol. I, Tr. 425-431). Mr. Zoppo himself was nowhere to be found.

The initial investigation of the fire disclosed several important facts. One was that the fire was determined by the investigating authorities to be caused by arson. It was deliberately set and involved the use of gasoline or some other accelerant (Vol. II, Tr. 887). Another was that Mr. Zoppo could not explain his whereabouts at the time of the fire or his activities on the night of the fire.

Mr. Morman took statements from Mr. Zoppo and from his girlfriend Jerri Garver on October 14, the day following the fire (Vol. II, Tr. 889). Mr. Zoppo first told Mr. Morman that he was at a trailer parked at a campground near Pymatuning Lake on the night of the fire. He said that he had gone to the Pymatuning area the day before the fire for hunting. He said he was alone. He said he attempted to telephone his bar about 2:00 a.m. on October 13 and that he kept getting a busy signal. He said that he tried to telephone Ms. Garver at her home but got no answer. He said that he went to sleep, called the bar again upon awakening, still got a busy signal, and headed straight back to Cleveland merely because the line was busy and because he couldn't reach anyone. When he arrived in Cleveland he discovered that the fire had occurred (Deft. Ex. GG).

Immediately after Mr. Zoppo gave this statement, Mr. Morman took a statement from Jerri Garver. She said that Mr. Zoppo had actually spoken with her about 2:15 a.m. on October 13. She told him that she had closed the bar and that everything was all right (Deft. Ex. GG). In view of Ms. Garver's statement that she had spoken to Mr. Zoppo during the middle of the night, his abrupt return to Cleveland the following morning simply because of a busy signal is difficult to fathom.

Mr. Zoppo also told Mr. Morman that he had owned the building for about three years (Vol. II, Tr. 890), when in reality he had owned it only six months. He denied having other insurance on the property or its contents

(Vol. II, Tr. 890), when in reality he did. Because of the incendiary nature of the fire and Mr. Zoppo's suspicious demeanor, Mr. Morman recommended to Homestead on October 14, that an expert in investigating fire origins be engaged (Vol. II, Tr. 894).

Homestead engaged James Churchwell, who is a fire investigation expert, to conduct an investigation of the cause and origin of the fire. Homestead also retained the law firm of Ulmer & Berne and Mr. Harold ("Kip") Reader of that firm to serve as its legal counsel. Both Ulmer & Berne and Mr. Reader are experienced and able attorneys in the area of property insurance (Vol. II, Tr. 896).

Mr. Churchwell undertook a thorough investigation of the fire. He interviewed fire fighters (Vol. III, Tr. 1111-18). He personally investigated and photographed the scene of the fire. He took photographs. He canvassed the neighborhood to determine what people knew about the cause of the fire. He spoke with a variety of individuals, including some of the individuals whose names have been suggested by Mr. Zoppo and Mr. Zoppo's counsel as possible perpetrators of the arson (Vol. II, Tr. 1046-47). He obtained statements from Dave Pogue, a frequenter of the bar, that included information, admittedly hearsay, that Mr. Zoppo, Ms. Garver, and her sister were involved in both the fire of October 13 and an unsuccessful attempt at arson one month earlier (Vol. III, Tr. 1161-66). While one can attempt to dismiss Mr. Pogue's statement because it contains hearsay, Mr. Pogue also recounted information about how the fire started that Mr. Churchwell knew was accurate from his own, personal observations (Vol. III, Tr. 1165).

Mr. Churchwell analyzed the security of the building on the evening of the fire and when firefighters arrived. He prepared a comprehensive report of his investigation, concluding it about January 31, 1989 (Def. Ex. VV).

One of plaintiff's insurance witnesses conceded that Mr. Churchwell's investigation "completely met" Homestead's duty to conduct a thorough investigation (tr. 357).

Mr. Churchwell also took second, more lengthy statements from Mr. Zoppo and Ms. Garver on October 18, 1988. He explored in more detail their activities on the night of the fire. Mr. Zoppo again stated that he repeatedly attempted to call his bar about 2:15 a.m. and always got a busy signal. He said that after sleeping in his trailer he arose about 9:00 a.m., called the bar, could not get through, and came immediately home because of his concern (Deft. Ex. UU).

When Mr. Churchwell spoke the same day to Ms. Garver, she no longer claimed that she had spoken to Mr. Zoppo during the night of October 13. But she did say that she and her sister had driven to Pymatuning uring the night after learning of the fire. She said that they arrived at Mr. Zoppo's trailer about 7:00 a.m., and that he was nowhere to be found. They drove around the Pymatuning area looking for him, eventually gave up, and returned to Cleveland. The Garver sisters were back in Cleveland and at Mr. Zoppo's bar for some time before he showed up at the fire scene (Deft. Ex. UU).

Mr. Churchwell wondered how could it be that the Garver sisters could arrive at the trailer at 7:00 without finding Mr. Zoppo, who was supposedly sleeping there until 9:00. He also wondered how the Garver sisters could have arrived back in Cleveland ahead of Mr. Zoppo if he had departed Pymatuning before their arrival and driven straight home because of his concern. Mr. Zoppo attempted to explain the discrepancy, first by volunteering that perhaps he had gone out into the woods that morning, and later by remembering that he had stopped for a leisurely breakfast before rushing home (Deft. Ex. UU).

The different explanations for Mr. Zoppo's whereabouts continued. When Mr. Zoppo gave a statement

under oath on December 30, 1988, to attorneys at Ulmer & Berne, he claimed that he stayed at a motel in the Pymatuning area on the night of the fire (Deft. Ex. CCC).

Homestead's investigation of the loss was not limited to inquiring about Mr. Zoppo's whereabouts. In addition to Mr. Churchwell's investigation, Mr. Walter Kolody of Homestead's home office in New Jersey came to Cleveland to inspect and videotape the scene of the loss (Vol.II, Tr. 925). Mr. Morman obtained the fire department report of the fire, which indicated that the structure was secure when firefighters arrived and that a forced entry was required (Vol. II, Tr. 898). Mr. Morman confirmed the building security in conversations with fire officials (Vol. II, Tr. 908-913), discussed the case with the police arson squad (Vol. II, Tr. 900), and either personally or through intermediaries examined court records, records of liquor purchases, and insurance records that were available at the office of Mr. Synek, Mr. Zoppo's agent. Ulmer & Berne analyzed documents and records, including tax returns and other financial information requested of Mr. Zoppo.

A number of facts were clear from the investigation. They included:

> 1) There was no evidence of a break-in on the night of the fire. Firefighters advised Mr. Morman and Mr. Churchwell that all doors and windows were secure upon their arrival. While it is true that when Mr. Churchwell inquired further about building security, he learned that the fire department could not be absolutely certain that one rear door was secure (although all believe it was), because of the damage it sustained in the fire, the fact remains that there was no evidence of a break-in. The fire department considered the building to be secure when it prepared its reports concerning the fire, which compels the conclusion that whoever started

the fire locked the building on the way out. Only Mr. Zoppo and the Garver sisters had keys.

2) The fire was called to the fire department about 2:52 a.m. The fire department arrived at the scene at 2:56 a.m. and found the building well engaged in fire. The extent of the fire at the time of the fire department's arrival suggested that the fire commenced either before or shortly after Ms. Garver closed the bar at 2:00 a.m. (Vol. III, Tr. 1110-11). (So does the fact that Mr. Zoppo got a busy signal if and when he called at 2:15 a.m. even though the phone was not in use. Mr. Churchwell explained how a phone system shorted in a fire will produce a busy signal (Vol. II, Tr. 1080).

3) Mr. Zoppo bought the building for $10,000 less than six months before the fire (Vol. II, Tr. 429, 941, 961-967). He had told Mr. Morman that he had owned it about three years. The circumstances concerning the purchase were peculiar. Mr. Zoppo was making only $8,000 to $10,000 a year from the bar (Plft. Exs. 199, 200, and 201 and Vol. II, Tr. 968-970). The neighborhood on the near west side was changing for the worst, and Mr. Zoppo's business was not robust. Buying the building, for a reported $10,000, was a dubious decision. Shortly after buying the building for $10,000, Mr. Zoppo then obtained building insurance from Homestead Insurance and insured it for $50,000. The insurance he obtained from Homestead had an annual premium of $4,700, and Mr. Zoppo financed the first premium payment at an interest rate of 15.25% (Tr. 436-7). The cost of the insurance reduced by approximately 50% the income Mr. Zoppo realized from his business annual.

4) Mr. Zoppo had reportedly been in Pymatuning one night in September, 1988, when an attempt to set fire to the bar had occurred. One of the Garver

sisters had driven to Pymatuning to find him on that occasion as well, but again without success.

5) If Mr. Zoppo was being truthful that he did not know of the fire until he returned to Cleveland late in the morning of October 13, there is absolutely no explanation for insurance investigators and his own insurance agent being on the scene before he was! The fire was reported to Mr. Zoppo's insurance agency about 9:00 a.m. Mr Zoppo didn't know of the fire for hours later, and there is no evidence that anyone else reported the claim (Vol. III, Tr. 1084-1088).

Mr. Morman and Mr. Churchwell concluded that Mr. Zoppo was involved in starting the fire (Vol. II, Tr. 957-972, Vol. III, Tr. 1125). Ulmer & Berne supervised the investigation, analyzed its results, took Mr. Zoppo's statement under oath, and ultimately wrote a lengthy letter to homestead (Deft. Ex. YY) recommending that the claim be denied. In a letter dated March 19, 1989, Homestead denied Mr. Zoppo's claim for the reason that it had concluded that he was involved in setting the fire (Pltf. Ex. 110). Mr. Zoppo filed suit for damages due for breach of the insurance contract and for bad faith.

During the course of discovery, additional facts of significance were disclosed. First, Elsie Zoppo, Mr. Zoppo's ex-wife, testified that Mr. Zoppo had left a phone number with her while he was in Pymatuning. She testified that she called the number between 5:00 and 6:00 a.m. October 13, shortly after learning about the fire. Mr. Zoppo was not available when she called, but he called back within 45 minutes. She told him about the fire. He said he already knew (Vol. I, Tr. 273-280). Her testimony, which is quite detailed and logical, seemed to refute all that Mr. Zoppo had ever said about his whereabouts and activities and her testimony clearly demonstrated that Mr. Zoppo knew about the fire before he drove to the bar late in the morning on October 13.

Second, Edward Synek, Mr. Zoppo's insurance agent, testified on deposition that he received the call reporting the loss from Mr. Zoppo (Vol. II, Tr. 780-81). That call also occurred hours before the time Mr. Zoppo claimed he learned of the fire. At trial Mr. Synek testified that he was at the fire scene by late morning or noon on October 13 after receiving the telephone notification of the fire at about 9:00 a.m. Vol. I, Tr. 428-432).

II. STATEMENT OF THE CASE

Mr. Zoppo's case against Homestead proceeded to trial on August 26, 1991. His claims for breach of contract and for bad faith were tried simultaneously. At the close of the plaintiffs' case, Homestead moved for a directed verdict as to the claim for bad faith and as to the claim for punitive damages. These motions were denied, although the trial court did state on the record that the motion regarding punitive damages was being denied only because the court believed that O.R.C. 2315.21 modified the common law standard for awarding punitive damages. The trial court agreed that plaintiffs' proof did not establish actual malice or a basis for recovery under the test established in *Preston v. Murty*, 32 Ohio St. 3d 334 (1987) (Tr 871-78).

Homestead renewed its motions for directed verdicts at the conclusion of all the evidence, and they were again denied (Vol. III, Tr. 1295-96). The trial court submitted the issues of breach of contract, bad faith, and punitive damages to the jury. The trial court also instructed the jury that it should award attorneys' fees to plaintiffs as additional compensatory damages if the jury found that punitive damages were appropriate. Both general verdicts and written interrogatories were submitted to the jury.

The jury returned general verdicts in favor of Mr. Zoppo on all issues. The written interrogatories were answered in ways that were consistent with the general verdicts. The jury awarded Mr. Zoppo $80,000 in compensatory damages on the contract claim and $122,800 in

compensatory damages on the bad faith claim. In answering the court's interrogatory regarding punitive damages, the jury answered that they should be awarded and indicated on the interrogatory that Homestead had acted with "insult."

The jury concluded that the reasonable attorneys' fees incurred by Mr. Zoppo were $65,000 and so indicated in their interrogatory answers. After the verdicts were returned, plaintiffs' counsel asked the court to instruct the jury to deliberate further, claiming that their was an possible inconsistency between the interrogatories and the general verdict regarding the bad faith claim. Plaintiffs' counsel claimed that it could not be determined whether the $122,800 damage amount included the $65,000 attorneys' fees.

The trial court first concluded, and rightly so, that there was no inconsistency. The court then reversed its ruling and, over objection, instructed the jury to deliberate further regarding the questions of bad faith damages and attorneys' fees and to modify the general verdict if attorneys' fees were intended to be in addition to the amount of compensatory damages. The jury did modify the general verdict so that it awarded $187,800 to plaintiffs (Vol. III, Tr. 1458-70).

The trial court entered judgment on the verdicts, as modified, in a total amount of $267,800 for compensatory damages. Pursuant to the jury's instruction that punitive damages be assessed, judgment for an additional $50,000 for punitive damages was entered by the trial court, making the total judgment $317,800.

Homestead filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial. Plaintiffs filed a motion for prejudgment interest and for costs. Save for awarding plaintiffs some modest litigation expenses, all post-trial motions were denied. Homestead filed a timely notice of appeal, and plaintiffs a notice of cross-appeal.

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT'S JURY CHARGE CONCERNING THE ELEMENTS OF THE TORT OF BAD FAITH WAS ERRONEOUS.

The tort of bad faith has been discussed and defined in a number of decisions of the Supreme Court of Ohio. Unfortunately, the definition of bad faith employed by the trial court throughout the proceedings below is contrary to all decisions of the Supreme Court and contrary to Ohio law. The trial court's erroneous definition of bad faith resulted in several prejudicial and reversible errors.

In *Motorists Mutual Insurance Company v. Said*, 63 Ohio St. 3d 690 (1992), the Supreme Court of Ohio defined bad faith as follows in the syllabus of the case:

> A cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim.

The Supreme Court's opinion in *Said* contains legal analysis that is important to the issues presented by this appeal in several important respects. First, the Supreme Court confirmed that "there is no precedential authority from any decision of this Court that supports the view that bad faith imports negligent behavior by the insurer in handling the claims of its insured," 63 Ohio St. 3d at 699. The Supreme Court also confirmed that the tort of bad faith does not exist unless some form of wrongful

intent is proven and that a finding of bad faith involves an inquiry into the insurer's state of mind.

The *Said* holding is not substantially different from other opinions of other Supreme Court cases. In the earlier decision of *Slater v. Motorists Mutual Insurance Company*, 174 Ohio St. 148 (1962), the Court had held as followed in its syllabus:

> A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

The trial court employed a definition and standard of bad faith that eliminated entirely both the requirement of intent and the need to inquire into the insurer's state of mind. The trial court in effect, treated the tort of bad faith as a claim for simple negligence. The standard employed by the trial court was the negligence standard of "reasonable justification." The trial court's erroneous jury charge on the question of bad faith reads as follows in its entirety:

> Now, plaintiff further alleges that the defendant did not act in good faith in the handling of plaintiff's insurance claim. Now, due to their relationship, an insurer has a duty to act in good faith in the handling of an insurance claim.
>
> Now, if you find for the defendant on plaintiff's contract claim, you must also find for the defendant on plaintiff's bad faith claim. But after considering all of the evidence, including the advice of counsel, if you find that the defendant was reasonably justified in denying plaintiff's claim, then you must find for the defendant on plaintiff's bad faith claim.

> If, however, after considering all of the evidence, including the advice of counsel, you find that the plaintiff has proven by a preponderance of the evidence that the defendant was not reasonably justified in denying plaintiff's claim, then you should award plaintiff damages in an amount which fairly and adequately compensates the plaintiff for any and all damages plaintiff incurred as a direct and proximate result of defendant's failure to act in good faith, tr. 1308-09, 1434-35.

It is apparent that the trial court's jury trial on the issue of bad faith is in error. All considerations of intent and knowledge, which form the essence of the tort of bad faith, were eliminated by the trial court's charge. The erroneous jury charge was obviously prejudicial to the defendant and expressly objected to by the defendant (Vol. III, Tr. 1329-1333, 1443). The jury's verdict on the issue of bad faith and the resulting judgment should be set aside.

The erroneous bad faith jury charge also requires that the awards of punitive damages and attorneys' fees be reversed. Since a verdict for plaintiff on the bad faith claim is a prerequisite to both punitive damages and attorneys' fees, any reversal of the bad faith award removes a necessary predicate for the punitive damages and attorneys' fees and causes them to fall.

The assignments of error that follow demonstrate that Homestead is entitled to relief more substantial than a new trial. The erroneous bad faith jury charge, however, requires at a minimum that the judgment in plaintiffs' favor on claims for bad faith, attorneys' fees, and punitive damages be reversed.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTIONS FOR A DI - RECTED VERDICT AND ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' BAD FAITH CLAIM.

Homestead made a motion for directed verdict on the bad faith claim at the conclusion of plaintiffs' case (Vol. II, Tr. 871-880). The motion was renewed at the conclusion of all the evidence (Vol. III, Tr. 1295) and in a motion for judgment notwithstanding the verdict. All motions were denied by the trial court.

The trial court, of course, employed the erroneous, negligence oriented, "reasonable justification" standard in reaching all of these rulings. When the evidence introduced by plaintiff in his case in chief is analyzed in the context of the correct legal standard, the standard expressed by the Supreme Court in *Said* and other cases, Homestead's entitlement to judgment as a matter of law on the bad faith claim is apparent.

The keystone of plaintiffs' case on bad faith was the testimony of John Williams, a retired insurance adjuster. Mr. Williams offered the opinion that Homestead's investigation of the loss was not adequate because certain follow-up statements were not pursued and that Homestead, therefore, had no "reasonable justification" for denying Homestead's claim (Vol. II, Tr. 751, 752, 758).

The additional investigation that Mr. Williams referred to in his testimony was clearly removed from the facts and circumstances of the fire itself. He did not claim that Homestead should have taken additional statements from Mr. Zoppo, or obtained additional records from Mr. Zoppo, or further investigated the scene of the fire. His suggested additional investigation was all in the nature of checking alibis and the credibility of witnesses,

the sort of additional investigation that one can always claim should be done, on matter how thorough the investigation already performed.

Mr. Williams did not testify that Homestead had investigated or denied the claim with a wrongful intent or that Homestead had knowingly denied a valid claim. He agreed that everything that Homestead had done was appropriate. He complimented its selection of counsel and agreed that the statements taken were appropriate. Moreover, when cross-examined, Mr. Williams agreed that some of the basic, elementary facts of the investigation permitted no logical conclusion other than Mr. Zoppo was involved in the fire. The simple fact that Mr. Synek was notified by Mr. Zoppo of the fire around 9:00 a.m. while the Garver sisters were driving to and from Pymatuning; Elsie Zoppo's detailed deposition testimony concerning her telephone conversations with Mr. Zoppo on the night of the fire; and Mr. Zoppo's own inconsistent statements, all lead to the clear and uncontrovertible conclusion that Mr. Zoppo knew about the fire long before he claimed to have learned of it and that there was no reasonable explanation for his conduct other than that he was involved in setting it (Vol. II, Tr. 770-790).

When the evidence presented by plaintiffs is analyzed in light of *Said,* Homestead's entitled to judgment on the bad faith claim is clear. Plaintiffs presented no evidence that can be said to constitute proof that Homestead had "no lawful basis for refusing the claim coupled with actual knowledge of that fact." Nor does any of plaintiffs' evidence permit the conclusion that Homestead refused to pay the claim because of "an intentional failure to determine whether there was any lawful basis for such refusal."

We remind the court that *Said* has confirmed that wrongful intent is an element of a bad faith claim. The plaintiffs proved no wrongful intent on Homestead's part.

The best that can be said for plaintiffs' proof is that the conclusion that Mr. Zoppo was involved in setting the fire was fairly debatable and that Homestead was advised by experienced counsel that the claim should be denied. We understate our case by saying that Mr. Williams admitted on cross-examination that the point was fairly debatable. He admitted more than that. The trial court, because it employed an improper standard in considering the bad faith claim, erred in denying Homestead's motions for a directed verdict and for judgment notwithstanding the verdict.

THIRD ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES.

Motions for a directed verdict on plaintiffs' claims for punitive damages were made at the conclusion of plaintiffs' case and at the conclusion of all evidence (Vol. II, Tr. 871, Vol. III, Tr. 1295). A motion for judgment notwithstanding the verdict on the punitive damage claims was made following the entry of judgment. All defendant's motions were denied by the trial court.

The trial court submitted the issue of punitive damages to the jury only because of an erroneous perception that the enactment of O.R.C. § 2315.21 as part of Ohio's tort reform legislation altered and expanded the common law concerning the availability of punitive damages in tort litigation.

The controlling decision of the Ohio Supreme Court as respects the awarding of punitive damages is *Preston v. Murty*, 32 Ohio St. 3d 334 (1987). *Preston*, which was cited with approval in *Said, supra*, held in the syllabus:

> Actual mailce, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

The *Preston* opinion also confirmed that, since punitive damages are assessed for punishment and not for compensation, "a positive element of conscious wrongdoing is always required" 32 Ohio St. 3d at 335.

The trial court stated on the record, in response to the motion for directed verdict:

> So I am going to deny the motion for a directed verdict on the punitive damages issue, because of the new Tort Reform Law. I feel that if it were not for the new Tort Reform Act, I would have to grant the motion. I don't see actual malice here. I don't think there is any ill will, spite or revenge on behalf of the insurance company, but whether or not they oppressed or insulted Mr. Zoppo, I think that's a different question. I mean, you would have to take it up with the Legislature. They passed this. That's what they say that entitles you to punitive damages, and that's what I got to go by. If it was on prior common law, I would grant your motion on the punitive damage issue, but since the standard has changed, I think the evidence is bare bones there. I don't think it's strong. I think it's possible on the evidence that the jury can find oppression or insult for those reasons, and I also don't feel I am the proper court to declare this statute unconstitutional (Vol. II, Tr. 877-878).

In point of fact, Ohio's tort reform legislation did adopt the common law requirements for punitive damages. Ohio courts have long used such terms as fraud, malice and insult in describing the circumstances in which punitive damages may be awarded. For example:

> It is an established principle of law in this state that punitive damages may be awarded in tort cases involving *fraud, malice or insult.* . . . There must be sufficient evidence of malice, however, before a question of punitive damages will be submitted to the jury.

Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 471 (1981) (Emphasis added). *See Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 37 (1989) ("Historically punitive damages in Ohio have been allowed in civil tort actions which involve ingredients of fraud, malice, or insult.").

Revised Code § 2315.21(B)(1) expressly incorporates the catch words that were found in the common law. It states that punitive damages may be awarded when "[t]he actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult . . ." Its language and the standard it adopts are in conformance with the common law.

Although courts have frequently utilized the catch words of malice, fraud or insult, it is equally apparent that proof sufficient to satisfy the requirements of *Preston* is required, even in bad faith cases, before a jury issue on punitive damages is presented, see *Said, supra*; *Staff Builders, Inc. v. Armstrong*, 37 Ohio St. 3d 298 (1988); *Hoskins v. Aetna Life Insurance Co.*, 6 Ohio St. 3d 272 (1983).

The rationale for requiring evidence of actual malice before submitting the issue of punitive damages to the jury was reiterated by the Ohio Supreme Court in 1991 in *Calmes v. Goodyear Tire & Rubber Co.*, 61 Ohio St. 3d 470, 473-74 (1991):

> Punitive damages in this state are available upon a finding of actual malice. "Actual malice" for these purposes is "(1) that state of mind under which a person's conduct is characterized by hatred,

> ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis *sic.*) *Preston v. Murty* (1987), 32 Ohio St. 3d 334, 512 N.E.2d 1174, syllabus.
>
> In *Preston* we arrived at the second standard for an award of punitive damages after a thoughtful review of the circumstances for which, and standards under which, punitive damages have been awarded in the past. Specifically, we held there, and hold here that punitive damages are intended to punish and deter conduct resulting from a mental state so callous in its disregard for the rights and safety of others that society deems it intolerable. This mental state is the component of the standard contained in the phrase "conscious disregard for the rights and safety of other persons * * *." *Id.* at 335, 512 N.E.2d at 1176.
>
> In addition to defining the requisite mental state, *Preston* also held that misconduct greater than mere negligence is required. This component is expressed in the language "great probability of causing substantial harm," which replaced language from earlier cases such as "outrageous," "flagrant," and "criminal." *Id.* at 335-336, 512 N.E.2d at 1176.

The legislative history, legal commentators, and the terms of the statute itself all confirm that the intent of O.R.C. § 2315.21(B) is to codify the common law as respect the conduct required to permit the imposition of punitive damages and to increase the burden of proof required before they may be imposed. The obvious effect of the statute is to make punitive damages less available than they were under prior law.

Attached as appendices B and C are copies of the presentations of Ronald Rispo and Victor Schwartz to the Ohio Senate concerning the tort reform statute. They

confirm that the statute was not intended to expand the availability of punitive damages. Also attached as appendix D are those pages from the Banks-Baldwin Company's commentary *Ohio Civil Justice Reform Act* analyzing the provisions of O.R.C. § 2315.21. The Banks-Baldwin commentary agreed that the effect of the statute is to codify the standard of conduct required for the recovery of punitive damages.

The trial court correctly concluded that plaintiffs had no claim for punitive damages under the standard announced by the Supreme Court in *Preston* and similar decisions. The trial court failed to appreciate that the standard created by O.R.C. § 2315.21(B) is not a different standard. Plaintiffs proved no claim for punitive damages against Homestead, and it was reversible and prejudicial error for the trial court to deny Homestead's motions for directed verdict and for judgment notwithstanding the verdict.

FOURTH ASSIGNMENT OF ERROR:

THE TRIAL COURT'S JURY CHARGE ON THE ISSUE OF PUNITIVE DAMAGES WAS ERRONEOUS.

Assuming *arguendo* that the plaintiffs' evidence presented a jury question on the issue of punitive damages, the trial court nonetheless erred in its jury instruction on punitive damages. The trial court instructed the jury that it should assess punitive damages against Homestead if it found that Homestead's conduct constituted "oppression" or "insult." "Oppression" was defined as "an excessive or cruel exercise of authority or power." "Insult" was defined as encompassing pride, arrogance, insolence, indignity, or contempt. Thus, the court instructed the jury that it should assess punitive damages if it found that Homestead was proud or insolent. The charge was objected to by Homestead (Vol. III, Tr. 1437, 1443, 1327).

Such a standard for punitive damages cannot withstand the tests established by the Supreme Court in such cases as *Preston* and *Leichtamer, supra.* Even if O.R.C. § 2315.21 was intended to expand the availability of punitive damages, the expansion needs to be consistent with that which is expanded upon. Is it sensible for the law to require "an element of conscious wrongdoing" as a prerequisite for punitive damages where one acts with malice, but not if one acts insolently or with pride? Obviously not. The standards must be consistent and compatible, regardless of the specific label given to the defendant's conduct.

We submit that the court's jury charge demonstrates the error of charging the jury on punitive damages at all. The motorist who fails to yield can be said to have acted insolently or arrogantly, but is such conduct sufficient for an award of punitive damages? If insult and oppression are to be considered separate and independent grounds for awarding punitive damages, and we submit that they should not be so considered, then definitions of those terms comparable to the Supreme Court's definition of malice must be developed. The trial court's charge on punitive damages was insufficient, erroneous, and prejudicial.

The prejudice caused by the court's punitive damage charge is clear. The jury circled on its special interrogatories that Homestead had acted with "insult" (Vol. III, Tr. 1456-57). The assessment of punitive damages in this case, therefore, was not because of any finding of malice or conscious wrongdoing, but because of pride, arrogance, insolence, or contempt. The jury charge was erroneous, and the punitive damage verdict should be reversed.

FIFTH ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY TO CONSIDER EMOTIONAL DISTRESS AS AN ELEMENT OF DAMAGES.

Emotional distress is not an element of damage to be considered in an intentional tort claim for bad faith. Even if mental distress could properly be considered in bad faith cases generally, the absolute dearth of evidence as to any real distress should have precluded any consideration of emotional distress in this case.

The court improperly instructed the jury to consider plaintiffs' emotional distress to determine damages. Without defining emotional distress, the court instructed the jury:

> Now, in determining the actual amount of the compensatory damages on plaintiff's bad faith claim, you are to consider the emotional distress of the plaintiff caused by the insurer's misconduct . . . (Vol. III, Tr. 1435-36).

Prior to the giving of this instruction, Homestead had objected to the inclusion of emotional distress as a damage element (Vol. III, Tr. 1322-24). During discussions regarding the proposed jury instructions, the court had acknowledged there was insufficient evidence to support a claim of damages due to emotional distress. The trial court commented that he had heard no evidence of mental distress (Vol. III, Tr. 1289). This comment was quite correct.

Counsel for plaintiff had attempted to elicit testimony from the plaintiff regarding emotional distress, but plaintiff did not provide any testimony as to impaired function, depression, or a debilitating mental condition. Mr. Zoppo's sole testimony to support damages for emotional distress was as follows:

Q. The last three years, up until this trial started, have you thought about the insurance company's actions?

A. I think about it all the time.

Q. How has it affected you, Don?

A. It affected me a lot.

Q. Well, you got to tell the jury, Don. They can't read your mind.

A. Well, that was everything I had, and I got it all torn down and everything for something I didn't do. (Vol. II, Tr. 710-711)

This testimony is insufficient to establish emotional distress even if emotional ditress was an element of damages for a bad faith claim. Nevertheless, counsel for plaintiff-appellee Zoppo argued that Mr. Zoppo's testimony allowed the jury to *infer* that some emotional distress had occurred.

This jury was instructed to calculate damages due to emotional distress based upon a possible inference of such distress. No psychologist, friend or relative came in to curt to testify regarding any change in Mr. Zoppo's demeanor; any symptoms of severe or debilitating dysfunction; or regarding any other possible evidence that Mr. Zoppo was unable to cope with serious mental distress. *See Paugh v. Hanks*, 6 Ohio St. 3d 72 (1983); *Yeager v. Local Union 20*, 6 Ohio St. 3d 369 (1983). Consequently, the jury charge permitting the jury to award damages for emotional distress was erroneous and the compensatory damage verdict should be reversed.

SIXTH ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN THE ADMISSION OF EVIDENCE OF A CONTINGENCY FEE AGREEMENT AND IN THE JURY CHARGE CONCERNING ATTORNEYS' FEES.

A. THE TRIAL COURT ERRED WHEN IT PERMITTED EVIDENCE OF THE CONTINGENCY FEE AGREEMENT.

Plaintiffs' attorney was improperly permitted to testify regarding his contingency fee arrangement with Mr. Zoppo (Vol. II, Tr. 840) over the objection of defendant Homestead (Vol. II, Tr. 830-836). The Ohio Supreme Court has expressly identified the factors to be considered when awarding attorney fees in *State ex rel. Montrie Nursing Home, Inc. v. Creasy*, 5 Ohio St. 3d 124, 128 (1983).

> If the court below ultimately finds that attorney's fees are proper under these circumstances, the court will consider the following factors in arriving at the amount of allowable fees: (1) the time and labor involved in maintaining this litigation, (2) the novelty, complexity, and difficulty of the questions involved, (3) the professional skill required to perform the necessary legal services, (4) the experience, reputation, and ability of the attorneys, and (5) the miscellaneous expenses of this litigation.

The Ohio Supreme Court instructed the Court of Appeals on remand to award fees based upon a determination of reasonable compensation and further ordered "the court shall not award simply a percentage of the as attorney's fees." *See also, Hutchinson v. J.C. Penney Cas. Ins. Co.*, 17 Ohio St. 3d 195, 200 (1985). Contingency fee arrangements are not relevant proof of the value of the attorney's work.

In the absence of competent evidence of the value of the legal services rendered, a jury's award of attorney fees cannot be supported. *See Villella v. Waikem Motors, Inc.*, 45 Ohio St. 3d 36, 41 (1989) (award of attorney fees was reversed and remanded where there was "no substantive evidence contained in the trial record concerning the value of appellee's attorney fees in accordance with the *Hutchinson* rationale").

Since plaintiff Zoppo's only evidence of the value of his attorney's work was his own attorney's testimony which included a disclosure of the contingency fee agreement, the evidence did not conform with the requirements set forth by the Ohio Supreme Court.

B. THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY REGARDING THE DETERMINATION OF THE AMOUNT OF ATTORNEY FEES.

The court's charge to the jury for the determination of attorney fees deviated from the factors set forth by the Ohio Supreme Court. The trial court below instructed the jury upon a fifth factor to be considered "the customary and usual fee for such legal services" (Vol. III, Tr. 1438). Attorney Rutter had been permitted to testify that there was a contingency fee agreement for 32 percent of the gross amount recovered and that this was "a reasonable and standard amount to charge for the representation of an individual" (Vol. II, Tr. 840). The trial court then denied defendant Homestead's request that the jury be instructed that a contingency fee agreement is not the reasonable measure for the determination of attorney fees (Vol. III, Tr. 1443).

The jury was undoubtedly convinced that the contingency fee agreement was the standard measure for reasonable fees since the instruction improperly permitted the consideration of the fee agreement without any ex-

pert testimony as to the other factors delineated by the Ohio Supreme Court.

SEVENTH ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO DELIBERATE FURTHER AFTER THE JURY RETURNED ITS GENERAL VERDICT AND WRITTEN INTERROGATORIES.

On at least three occasions the trial court instructed the jury that an attorney fee award was an element of compensatory damages on the bad faith claim. Before plaintiffs' attorney Robert Rutter testified about the contingency fee agreement, the trial court provided a narrative explanation to the jury as to why a trial attorney was taking the witness stand. The court explained:

> In the event that you award punitive damages in this case, then the attorney fees of Mr. Rutter become an element of compensatory damages on the bad faith claim. (Vol. II, Tr. 837)
>
> So in the event you would indicate to me punitive damages should be awarded, then you are to include Mr. Rutter's fees and the compensatory damages on the bad faith claim. (Vol. II, Tr. 838)

At the time of the instructions to the jury, the trial court reiterated.

> Now, if you find that plaintiff is entitled to punitive damages, then and only then you may, but are not required to include plaintiff's financial attorney fees as part of the compensatory damages award, in plaintiff's bad faith claim. (Vol. III, Tr. 1437)

The jury panel returned a General Verdict form finding for plaintiff "on plaintiff's bad faith claim against defendant in the amount of $122,800." Consistent with

that verdict form, the jurors answered Special Interrogatory No. 4 as follows:

> What amount of money is Donald Zoppo entitled to from Homestead Insurance Company as a direct and proximate result of Homestead's failure to act in good faith?
>
> Answer: *$122,800.*

The court improperly instructed the jury to deliberate further and to alter the responses. The court further instructed that the verdict form and the response to Interrogatory No. 4 should be increased to $187,800 if the jury wished the attorney fees on top of, in excess of, the $122,800 award (Vol. III, Tr. 1460-67).

Because an attorney fee award is an item of compensatory damage on the bad faith claim, the verdict form and interrogatory response were consistent when they each awarded $122,800 for all damages on the bad faith claim. Because there was no inconsistency, the instruction to increase the award was not authorized by Civil Rule 49(B) and provided a windfall to the plaintiff in the amount of $65,000.

If the judgment against the defendant on the bad faith claim is proper, then the verdict for plaintiff on the bad faith claim should be for $122,800. The original verdict form and interrogatory responses were consistent and the damages award should not be increased. Judgment notwithstanding the verdict should be entered in the amount of $122,800 on the bad faith claim if the judgment on the bad faith claim is not vacated.

EIGHTH ASSIGNMENT OF ERROR:

THE JURY VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The preceding assignments of error demonstrate that Homestead is entitled to judgment as a matter of law as

respects certain of plaintiffs' claims and to a new trial as to others. Apart from errors of law that occurred, however, the verdicts themsleves are against the manifest weight of the evidence, both as to the breach of contract claim and the bad faith claim.

With respect to the breach of contract claim, the nature of the fire, the fact that cans of accelerant were found in the debris, the fact that the fire had to have started while Ms. Garver was in the building or immediately upon her leaving, the fact that the building was secure when the fire department arrived, the fact that Mr. Zoppo could not explain his whereabouts, the repeated wild goose chases to Pymatuning, the changes in his story from campground to motel to campground, the timing of the notice to the insurance agent, Mrs. Zoppo's testimony regarding her conversations with Mr. Zoppo, the declining neighborhood, the implausible decision to purchase the building, the relatively high cost of insuring it, the financing of the premium, and the short period of time that the insurance was in effect, all present a compelling case for Mr. Zoppo's involvement in the fire.

The case to the contrary, the claim that people in the neighborhood set the fire because they had been barred from the bar, is hardly credible. Everyone and anyone is a suspect according to plaintiffs' theory of the case. Randy Csanyi came into court to testify about the "threats" made by other suspects to burn the bar (Vol. I, Tr. 243-45), yet Mr. Csanyi himself had been previously identified by his supposedly good friend Mr. Zoppo as one of the prime suspects (Vol. I, Tr. 252-53). Those who heard Larry Bibbins talking about burning the bar, both before and after the fire, dismissed his remarks as joking made in bad taste or drunken chatter (Vol. I, Tr. 221-22, 118-120).

As respects the bad faith claim, the overwhelming weight of the evidence was that Homestead acted in good

faith. The investigation was begun promptly, was done by competent and experienced investigators, involved a top flight law firm, and was promptly concluded. One could always argue that one more statement should be taken or one more loose thread unravelled, but Homestead's investigation of the fire was surely complete in all meaningful respects. There was no evidence of any improper motive on Homestead's part, no ill will, no lack of good faith. The jury's verdict is contrary to the manifest weight of the evidence.

III. CONCLUSION

Defendant Homestead Insurance Company respectfully submits that prejudicial error occurred during the course of the proceedings below. Homestead respectfully prays that the judgment of the trial court be reversed and vacated. Homestead prays that final judgment be entered in its favor with respect to plaintiffs' claims for bad faith and punitive damages and that a new trial be ordered on plaintiffs' claim for breach of contract. In the alternative, a new trial should be ordered on all issues.

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A copy of the foregoing has been mailed this 13 day of July, 1992, to Robert P. Rutter, attorney for plaintiffs, 6200 Rockside Road, Suite 200, Independence, Ohio 44131.

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